

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 165

MAX LERNER, APPELLANT,

vs.

HUGH J. CASEY, WILLIAM G. FULLEN,
HARRIS J. KLEIN, ET AL.

APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF NEW YORK

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1 IN NEW YORK SUPREME COURT
OF THE STATE OF NEW YORK

In the Matter of the Application of

MAX LERNER, *Petitioner-Appellant*,

for an Order under Article 78 of the
Civil Practice Act,

— against —

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
HENRY K. NORTON and DOUGLAS M. MOFFAT, constituting
the New York City Transit Authority, *Respondents*.

Statement Under Rule 234

This proceeding under Article 78 of the Civil Practice Act was commenced by the service of a notice of motion, verified petition and exhibits on or about December 10th, 1954. A notice of cross-motion was served by the respondents on December 15th, 1954.

The order of the Supreme Court appealed from, denying petitioner's application and granting respondents' cross-motion, was entered on the 29th day of January, 1955. Notice of Appeal to the Appellate Division, Second Department, was served on February 8th, 1955. That Court rendered the decision affirming the order below on June 25, 1956. Notice of appeal to this Court was served and filed on August 17, 1956.

2 The full names of the original parties are as above set forth. There has been no change of parties herein, except for changes in the composition of the membership of the Transit Authority.

The name of the attorney for the petitioner is Leonard B. Boudin, office and post-office address, No. 25 Broad Street, Borough of Manhattan, City of New York. The name of the respondents' attorney is Daniel T. Scannell, office and post-office address, No. 370 Jay Street, Borough of Brooklyn, City of New York. Mr. Scannell, who appeared for the respondents in the Court below, has succeeded Harold L. Warner, who first appeared for respondents, as General Counsel of the Transit Authority. Jacob K. Javits, Attorney-General of the State of New York, by James O.

Moore, Jr., Solicitor General, and Ruth Kessler Toch, Assistant Attorney-General, submitted briefs, pursuant to Executive Law, Sec. 71.

3 IN SUPREME COURT OF NEW YORK,
KINGS COUNTY

Order Appealed From—Jan. 28, 1955

Present:

HON. BENJAMIN BRENNER, *Justice*.

4 The petitioner above named having moved this Court, pursuant to Article 78 of the Civil Practice Act, for an order directing that the petitioner be reinstated and restored to his position as Conductor by the New York City Transit Authority with full pay as of October 21, 1954, and that petitioner be restored to full rights as an employee of the said New York City Transit Authority, and for a further order declaring any investigation of petitioner by the Commissioner of Investigation of The City of New York to have been beyond the power of said Commissioner of Investigation and illegal, null and void, and for a further order declaring petitioner's suspension by the New York City Transit Authority on or about October 21, 1954, and his subsequent discharge by said Authority on or about November 24, 1954, to be invalid and illegal as being contrary to statute and contrary to the Constitution of New York State and the Constitution of the United States, all after a review of the determination and decisions of the New York City Transit Authority in suspending and discharging petitioner, to the end that the determinations and decisions of said New York City Transit Authority be reviewed and corrected on the merits by the Court, and all errors committed in suspending and discharging petitioner be corrected pursuant to law, and the respondents having made a cross-motion herein for an order pursuant to Section 1293 of the Civil Practice Act dismissing the petition herein on the ground that it does not state facts sufficient to entitle the petitioner to be

relief prayed for, or to any part thereof, or to any other relief, and on the ground that such petition is insufficient as a matter of law, and said motion and cross-motion having duly come on to be heard on the 21st day of December, 1954;

Now, on reading the notice of motion dated December 10, 1954, the petition and affidavit of Max Lerner annexed thereto verified December 9, 1954, and petitioner's Exhibits I and II, also annexed thereto, and respondents' notice of motion to dismiss the petition, dated December 14, 1954, and after hearing Leonard B. Boudin, Esq., attorney for petitioner, in support of petitioner's application and in opposition to respondents' motion to dismiss, and Harold L. Warner, Esq., attorney for respondents, in support of respondents' motion to dismiss and in opposition to petitioner's application, and Jacob K. Javits, Esq., Attorney General of the State of New York, by Henry S. Manley, Solicitor General, and Ruth Kessler Toch, Assistant Attorney-General, having submitted a memorandum pursuant to Executive Law, Section 71, in support of the constitutionality of Chapter 14 of the Unconsolidated Laws of the State of New York, and due deliberation having been had, and the Court having rendered its decision, and on filing the opinion of the Court; On motion of Harold L. Warner, Esq., attorney for respondents, it is

ORDERED, that the petitioner's application be and the same hereby is denied; and it is

FURTHER ORDERED, that the motion of the respondents to dismiss the petition herein be and the same hereby is granted and the petition herein and this proceeding are hereby dismissed.

Enter,

BRENNER,
J. S. C.

Granted:

Jan. 28, 1955,

FRANCIS J. SINNOTT.

6 IN SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

Notice of Motion—Dec. 10, 1954

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition of Max Lerner, duly verified the 9th day of December, 1954, the undersigned, pursuant to Article 78 of the Civil Practice Act will move this Court at a Special Term, Part I thereof, to be held in and for the County of Kings at the Municipal Building, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 21st day of December, 1954 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing that petitioner be reinstated and restored to his position as Conductor by the New York City Transit Authority with full pay as of October 21, 1954, and that petitioner be restored to full rights as an employee of the said New York City Transit Authority, and for a further order declaring any investigation of petitioner by the Commissioner of Investigation of the City of New York to have been beyond the power of said Commissioner of Investigation and illegal, null and void, and for a further order declaring petitioner's suspension by the New York City Transit Authority on or about October 21, 1954, and his subsequent discharge by said Authority on or about November 24, 1954, to be invalid and illegal as being contrary to statute and contrary to the Constitution of New York State and the Constitution of the United States, all after a review of the determinations and decisions of the New York City Transit Authority in suspending and discharging petitioner, to the end that the determinations and decisions of said New York City Transit Authority be reviewed and corrected on the merits by this Court, and all errors committed in suspending and discharging petitioner may be corrected pursuant to law, and for such other and further relief as may be just and proper in the premises.

PLEASE TAKE FURTHER NOTICE that pursuant to Section 1291 of the Civil Practice Act, you are required to serve,

at least two days prior to the return date, a verified answer annexing thereto the certified transcript of the record of the proceedings subject to this review and any and all affidavits or other written proof to be used herein.

Dated: New York, N. Y., December 10, 1954.

8

Yours, etc.,

LEONARD B. BOUDIN, Esq.,
Attorney for Petitioner.

To:

HUGH J. CASEY,
WILLIAM G. FULLEN,
HARRIS J. KLEIN,
HENRY K. NORTON,
DOUGLAS M. MOFFAT,
constituting the New York City
Transit Authority,
370 Jay Street,
Brooklyn, New York.

9

IN SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

Petition. Read in Support of Motion

To the Supreme Court of the State of New York:

The petition of Max Lerner respectfully shows:

1. Petitioner is a citizen of the United States and a resident of the Borough of Bronx, City and State of New York. He brings this proceeding, pursuant to Article 78 of the Civil Practice Act, on his own behalf against the New York City Transit Authority, herein called the "Transit Authority", as a former employee of said Transit Authority.

2. Respondents, Hugh J. Casey, William G. Fullen, Harris J. Klein, Henry K. Norton and Douglas M. Moffat, are members of the Transit Authority, a public benefit

corporation organized pursuant to Chapter 200, Laws of 1953, *Public Authorities Law*, Title 15, Section 1800 *et seq.*, to acquire and operate the transit facilities formerly operated by the Board of Transportation of the City of New York, herein called the "Board". The principal offices of the Transit Authority are located at 370 Jay Street, Borough of Brooklyn, County of Kings, City and State of New York.

3. Subsequent to the enactment of the foregoing legislation, the Transit Authority upon information and
10 belief, did acquire and operate the transit facilities of the City of New York. Pursuant to Section 1810, *Public Authorities Law*, petitioner and all other employees of the Board became employees of the Transit Authority subject to the provisions of the Civil Service Law. From on or about November 1, 1935, until his suspension on or about October 21, 1954, petitioner was continuously employed in the Transit System of New York City. The facts concerning petitioner's suspension and subsequent dismissal on or about November 24, 1954 from his position as "Conductor" are more specifically set forth below. Petitioner's last assignment was that of Conductor on the Independent Division of the subway system; his primary duties consisted of opening and closing subway car doors to permit the entrance and exit of passengers together with certain routine duties incidental thereto.

4. Petitioner's service, as an employee, has at all times been deemed satisfactory by the Transit Authority and its predecessors who employed petitioner. At no time prior to October 21, 1954, was petitioner ever suspended, discharged, nor did petitioner at any time sustain any loss of pay as a disciplinary measure. Indeed, petitioner's service has been marked by the award of a commendation for having
11 saved the life of a person whom petitioner, at one time, discovered on the subway tracks.

5. On September 14, 1954, petitioner, pursuant to oral instructions from his immediate supervisor on the previous day, appeared at the office of the Commissioner of Investigation of the City of New York. Petitioner was
11 received by a Deputy Commissioner, upon information and belief, Mr. O'Connor, who advised petitioner that

petitioner was there for the purpose of answering questions in an investigation being conducted by that office. Mr. O'Connor further advised petitioner that unless petitioner answered all questions fully, petitioner would be subject to dismissal from his job in accordance with the provisions of Section 903 of the New York City Charter.

6. Thereupon, petitioner was sworn. After one or two preliminary questions intended to identify petitioner, petitioner was asked a series of questions concerning his political affiliations which, relying upon his constitutional privilege, petitioner declined to answer. Said hearing was then and thereafter adjourned.

7. Subsequently, on two different adjourned dates, September 30, 1954 and October 8, 1954, petitioner appeared with counsel and was advised that the Mayor of the City of New York had authorized the Commissioner of Investigation to inquire into the employment of certain persons in specifically enumerated agencies among which was included the Transit Authority and that said inquiry was to be conducted in conformity with the Security Risk Law, Chapter 233, Laws of 1951. The Commissioner's Deputy declined to state, upon inquiry by counsel, whether charges of any nature had been made against petitioner. On October 8, 1954, petitioner was again sworn and reiterated his refusal to answer for the same reasons stated above.

12 8. On October 21, 1954, petitioner was suspended by the Transit Authority on the grounds that he had invoked his constitutional privilege in refusing to answer the questions of the Commissioner of Investigation of the City of New York. A photostatic copy of the Transit Authority's resolution of suspension and letter of transmittal is annexed hereto as petitioner's "Exhibit I". In said letter of transmittal, petitioner was given thirty days within which to file affidavits or statements. The clear purpose of the statutory provision affording the right to file statements or affidavits was to enable a person, situated as this petitioner, to answer, rebut or explain mitigating circumstances of any charges against him. No charge of any nature appears in said letter of transmittal and resolution of suspension other than the statement that petitioner had invoked his constitutional privilege before

the Commissioner of Investigation. In the absence of charges of misconduct or wrongdoing, petitioner submitted no affidavits or statements. There is no dispute as to the assertion of constitutional privilege by petitioner.

9. On or about November 24, 1954, petitioner was discharged from his position as Conductor by the Transit Authority. A photostatic copy of the letter of Transmittal and the resolution of discharge is annexed hereto as petitioner's "Exhibit II".

10. The Commissioner of Investigation was without authority to conduct an inquiry into employees of the Transit Authority. Petitioner, and all other transit employees, at all times hereinabove set forth, was an employee of the Transit Authority and not of the City of New York. The powers of the Commissioner of Investigation do not include the authority to investigate employees of a non-city agency under the circumstances herein set forth.

11. Since the inquiry conducted by the Commissioner of Investigation was illegal, null and void, the purported proceeding conducted by the Commissioner of Investigation cannot be made the basis for disciplinary action by the Transit Authority.

12. Although purporting to act pursuant to the Security Risk Law, the Transit Authority has failed to conduct a proper investigation or inquiry in compliance therewith. Attempted delegation of its obligation to investigate or inquire to the Commissioner of Investigation of the City of New York was ineffective in view of the fact that the power of the Commissioner of Investigation to investigate was at all times limited by the New York City Charter to matters concerning agencies of the City of New York.

13. The Security Risk Law is unconstitutional in that as written and as applied it is inconsistent with procedural due process. The charges which may be made thereunder are necessarily vague and indefinite. The standards set forth therein are similarly vague and indefinite. It provides for the consideration of secret evidence and deprives one affected thereby of the opportunity to be confronted

by witnesses or to rebut unfavorable testimony. The
 14 Security Risk Law is further unconstitutional in that,
 as written and as applied herein, it acts to deprive
 of substantive due process. Assertion of a constitutional
 privilege cannot be grounds for discharge from employ-
 ment.

14. Petitioner has been denied the rights accorded him
 under Section 22 of the Civil Service Law. Petitioner did
 not receive written notice of proposed removal. Peti-
 tioner did not receive any statement of charges against
 him. Petitioner was not given a reasonable opportunity
 to answer any charges as provided by said law.

WHEREFORE, petitioner respectfully prays that an order
 be granted declaring said investigation by the Commissioner
 of Investigation, to be beyond the power of said Commis-
 sioner of Investigation, illegal, null and void, and declaring
 that petitioner's suspension and discharge as set forth were
 invalid, contrary to statute and contrary to the State and
 Federal constitutions; directing that petitioner be rein-
 stated to his position as Conductor with full pay as of
 October 21, 1954, and be restored to full rights as an em-
 ployee of the Transit Authority, and for such other and
 further relief as may be just and proper in the premises.

Dated: New York, N. Y., December 9, 1954.

MAX LERNER,
 Petitioner.

(Duly verified December 9, 1954.)

Petitioner's Exhibit I to Petition**NEW YORK CITY TRANSIT AUTHORITY****370 JAY STREET****BROOKLYN 1, N. Y.****Telephone ULster 2-5000**

Refer to 402-W

October 21, 1954

Max Lerner
220 Miriam Street
Bronx 58, N. Y.

Dear Sir:

You are hereby notified that the New York City Transit Authority has found after proper investigation and inquiry, that upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, your employment in the position of Conductor will endanger the security or defense of the nation and state. Therefore, the Authority, pursuant to Section 1105 of the Unconsolidated Laws of the State of New York (L. 1951, C. 233, subd. 5), has suspended you from such position, without pay, effective at the close of business on October 22, 1954. A certified copy of the resolution suspending you is enclosed.

This action has been taken because on September 14, 1954, when testifying under oath at the office of the Commissioner of Investigation of The City of New York, you refused to answer questions as to whether you were then a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the United States. Furthermore, having been advised of the provisions of the Security Risk Law (L. 1951, C. 233, as amended), and
16 after having been given an opportunity to reconsider your refusal, and having been given a postponement from September 21 to September 30, 1954, to engage counsel, and a further adjournment at the request of your counsel from September 30 to October 8, 1954, you appeared with counsel on the latter date and again refused to answer questions as to whether you were then or had been a member of the Communist Party and again invoked the Fifth Amendment to the Constitution of the United States.

You have the opportunity, within thirty days after this notification, to submit statements or affidavits to show why you should be reinstated or restored to duty.

You will be notified of any further action by the Authority in this matter.

Very truly yours,

S. H. BINGHAM,
*Executive Director and
General Manager.*

WHEREAS, the Department of Investigation of The City of New York has furnished this Authority with a copy of its Report No. MR-10951(D), dated October 11, 1954, from which it appears that Max Lerner, Conductor, Pass No. 23-3592, in the employ of this Authority, in testifying under oath before said Department of Investigation on September 14, 1954, refused to answer questions as to whether or not he was a member of the Communist Party and invoked the Fifth Amendment to the Constitution of the

17 United States, and that after being advised of the provisions of the Security Risk Law (L. 1951, C. 233, as amended), and being given an opportunity to reconsider his refusal, he appeared at the office of the Department of Investigation on September 21, 1954, at which time he requested additional time to engage counsel, and that on September 30, 1954, he appeared, accompanied by counsel, who requested and was granted a further adjournment, and it further appears that on October 8, 1954, said Max Lerner appeared with counsel and again refused to answer questions as to whether he was then or had been a member of the Communist Party, and again invoked the Fifth Amendment to the Constitution of the United States; and

WHEREAS, this Authority has found, after due investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of his doubtful trust and reliability, the employment of Max Lerner in the position of Conductor would endanger the security or defense of the nation and the state;

RESOLVED, that Max Lerner, Conductor, be and he hereby is suspended without pay effective at the close of business on October 22, 1954;

FURTHER RESOLVED, that a certified copy of this resolution be delivered to said Max Lerner, either in person or by registered mail, with notice of his suspension and the reasons therefor;

FURTHER RESOLVED, that at any time within thirty days after delivery to said Max Lerner of such notice, he may submit statements or affidavits to show why he should be reinstated or restored to duty;

FURTHER RESOLVED, that the Executive Director and General Manager be directed to conduct such further investigation and review as may be necessary in the circumstances and to report to this Authority at the expiration of thirty days from the date of notification to said Max Lerner.

NEW YORK CITY TRANSIT AUTHORITY

By Wm. Jerome Daly,
Secretary.

October 21, 1954

I, Wm. Jerome Daly, Secretary of New York City Transit Authority, DO HEREBY CERTIFY, that I have compared the attached with the original adopted by the New York City Transit Authority, on October 21, 1954, and on file in the office of said Authority, and that it is a correct transcript thereof and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the seal of the New York City Transit Authority, this 21st day of October, 1954.

WM. JEROME DALY,
Secretary.

19 **Petitioner's Exhibit II to Petition****NEW YORK CITY TRANSIT AUTHORITY****370 JAY STREET****BROOKLYN 1, N. Y.****Telephone ULster 2-5000**

Refer to 402-W

November 24, 1954

Max Lerner
220 Miriam Street
Bronx 58, N. Y.

Dear Sir:

As you have been previously notified, the Authority, by resolution dated October 21, 1954, suspended you without pay, effective at the close of business on October 22, 1954. This suspension was pursuant to Section 1105 of the Unconsolidated Laws of the State of New York (L. 1951, C. 233, subd. 5), and in accordance with its provisions, you were notified of the reasons for such action, and were given a period of thirty days from notice to you of your suspension within which to submit statements or affidavits to show why you should be reinstated or restored to duty.

Although the period of thirty days has elapsed, neither you, nor any person on your behalf, has submitted any statements or affidavits to the Authority, or in any way communicated with it.

Accordingly, at its meeting on November 24, 1954, this Authority, which has been duly designated by the State Civil Service Commission as a security agency, after reviewing the entire matter, has adhered to its finding

20 that, upon all the evidence, reasonable grounds exist

for belief that because of doubtful trust and reliability your employment in the position of Conductor will endanger the security or defense of the nation and the state, and therefore, pursuant to the above cited Section of the law, the Authority has terminated your employment, effective at the close of business on November 24, 1954.

A certified copy of the Authority resolution terminating

your employment is enclosed, and made a part of this notification.

Very truly yours,

S. H. BINGHAM,
Executive Director and
General Manager.

Encl.

WHEREAS, by resolution dated October 21, 1954, this Authority found, after due investigation and inquiry, that upon all the evidence, reasonable grounds existed for the belief that because of his doubtful trust and reliability the employment of Max Lerner, Pass No. 23-3592, in the position of Conductor, would endanger the security or defense of the nation and state, and accordingly suspended him, without pay, effective at the close of business on October 22, 1954, under the provisions of Section 1105 of the Unconsolidated Laws of the State of New York (L. 1951, C. 233, subd. 5); and

WHEREAS, the said Max Lerner, on October 22, 1954, was served with a certified copy of said resolution and with written notice that he could, at any time within 21 thirty days from the date of service of such notice, submit statements or affidavits to show why he should be reinstated or restored to duty, but he has failed to submit any such statement or affidavit; and

WHEREAS, by report dated November 22, 1954, S. H. Bingham, Executive Director and General Manager, has stated that, although the thirty-day period has elapsed, neither Max Lerner, nor anyone on his behalf, has communicated with the Authority, or with the Department of Investigation of The City of New York, and that further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk, and has recommended that his employment be terminated; and

WHEREAS, this Authority has found, after due investigation and inquiry, and upon review, that upon all the evidence, reasonable grounds exist for belief that because of

his doubtful trust and reliability, the employment of Max Lerner in the position of Conductor endangers the security or defense of the nation and state;

RESOLVED, that, pursuant to Section 1105 of the Unconsolidated Laws of the State of New York (L. 1951, C. 233, subd. 5), the employment of Max Lerner, Conductor, is terminated effective at the close of business on November 24, 1954;

FURTHER RESOLVED, that a certified copy of this resolution be delivered to said Max Lerner, either in person or by registered mail;

22 FURTHER RESOLVED, that the Secretary be and he hereby is directed to send a copy of this resolution to the Commissioner of Investigation of The City of New York and the City and State Civil Service Commissions.

NEW YORK CITY TRANSIT AUTHORITY

By WM. JEROME DALY,
Secretary

November 24, 1954

I, WM. JEROME DALY, Secretary of NEW YORK CITY TRANSIT AUTHORITY DO HEREBY CERTIFY, that I have compared the attached with the original adopted by the New York City Transit Authority, on November 24, 1954, and on file in the office of said Authority, and that it is a correct transcript thereof and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto subscribed my hand and affixed the seal of the New York City Transit Authority, this 24th day of November, 1954.

WM. JEROME DALY,
Secretary

23 IN SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

Notice of Cross-Motion—Dec. 14, 1954

Sir:

*PLEASE TAKE NOTICE that upon the petition herein, and the papers attached thereto, the undersigned will move this Court, by way of cross-motion, at a Special Term, Part I thereof to be held in and for the County of Kings at the Municipal Building, Court and Joralemon Streets, in the Borough of Brooklyn, City and State of New York, on the 21st day of December, 1954, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order pursuant to Section 1293 of the Civil Practice Act dismissing the petition herein on the ground that it does not state facts sufficient to entitle the petition to the relief prayed for, or any part thereof, or to any other relief, and on the ground that such petition is insufficient as a matter of law, and for such other and further relief as to this Court shall seem just and proper.

PLEASE TAKE FURTHER NOTICE that, in the event of the denial of this cross-motion, the respondents request leave of this Court to file their answer and to annex thereto the certified transcript of the record of the proceedings had herein and any and all affidavits or other written proof to be used herein, within twenty days thereafter, pursuant to the provisions of the Civil Practice Act thereto applicable.

24

Dated: Brooklyn, N. Y., December 14, 1954.

HAROLD L. WARNER, *Attorney for Respondents*

To:

LEONARD B. BORDIN, Esq.,
Attorney for Petitioner.

25 IN SUPREME COURT OF THE STATE OF
NEW YORK

KINGS COUNTY

SPECIAL TERM—PART I

Opinion—Jan. 24, 1955

By Mr. Justice BRENNER.

Re: *Lerner v. Casey*

This is a proceeding under article 78 of the Civil Practice Act for an order directing that petitioner be reinstated and restored to his position as a conductor by the New York City Transit Authority; for a further order declaring any investigation of petitioner by the Commissioner of Investigation of the City of New York to have been beyond the power of said commissioner, illegal and void; for a further order declaring petitioner's suspension by the New York City Transit Authority on October 21, 1954, and his subsequent discharge on November 24, 1954, to be illegal as contrary to statute and contrary to the Constitution of New York State and the Constitution of the United States.

The petition alleges that petitioner has been a subway conductor in the New York City Transit System for nineteen years, most recently as an employee of respondents.

26 Respondents are members of the New York City Transit Authority, a public benefit corporation, created by chapter 200 of the Laws of 1953 as amended. The Authority operates the transit facilities owned by the City of New York.

The petition alleges further that on September 14, 1954, petitioner was directed to and did appear in the office of the Commissioner of Investigation of the City of New York, where he was advised that he would be required to answer certain questions in an investigation being conducted by that office. After being sworn, petitioner was asked whether he was then a member of the communist party. He refused to answer this question and invoked the provisions of the Fifth Amendment of the Constitution of the United States. The examination was then adjourned to September 30, 1954, for the purpose of permitting petitioner to engage counsel. A further adjournment was

granted at the request of such counsel from September 30 to October 8, 1954. Petitioner appeared with counsel on the latter date and again refused to answer questions as to whether he was then or had been a member of the communist party and again invoked the Fifth Amendment. There is no dispute that the petitioner asserted the constitutional privilege.

The resolution suspending petitioner provided, pursuant to the provisions of the Security Risk, sections 1101 to 1108, inclusive of the Unconsolidated Laws, that at any time within thirty days after delivery to petitioner of notice of suspension, petitioner might submit statements or affidavits to show why he should be reinstated or restored to duty. The executive director and general manager of the Transit Authority was also directed to conduct
27 such investigation and review as might be necessary in the circumstances and to report back to the Authority on the expiration of the thirty-day period.

It is conceded that during the ensuing thirty-day period petitioner did not submit any affidavit or statement to the respondents. Thereupon the executive director and general manager of the Authority reported to respondents that neither petitioner nor anyone on his behalf had communicated with the Authority or with the Department of Investigation of the City of New York during the thirty-day period, and also reported that further investigation revealed activities on the part of petitioner which gave reasonable grounds for the belief that he was not a good security risk and recommended that his employment be terminated. In this respect the resolution of the Authority dated November 24, 1954, annexed as an exhibit to the petition, states: "Whereas, by report dated November 22, 1954, S. H. Bingham, Executive Director and General Manager, has stated that, although the thirty-day period has elapsed, neither Max Lerner, nor anyone on his behalf, has communicated with the Authority, or with the Department of Investigation of the City of New York, and that further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk, and has recommended that his employment be terminated: * * *"

The Authority then found upon review that upon all the evidence reasonable grounds existed for the belief that because of his doubtful trust and reliability, the employment of the petitioner in the position of conductor endangered the security and defense of the nation and state and therefore resolved, pursuant to section 1105 of the Unconsolidated Laws of the State of New York that the employment of petitioner be terminated effective November 24, 1954.

Petitioner challenges the action of the New York Transit Authority upon the following grounds: First, that the Commissioner of Investigation of the City of New York was without authority to investigate him as an employee of the Authority, a state agency; and that, since the inquiry conducted by the commissioner was illegal, null and void, it cannot be made the basis for disciplinary action by the Authority; second, that the Security Risk Law is unconstitutional as written and applied and is inconsistent with procedural due process; third, that reasonable grounds do not exist for the belief that petitioner's employment would endanger national and state security and defense; fourth, that respondents have failed to comply with the provisions of the State Civil Service Law; and fifth, that petitioner's right to seek relief under article 78 of the Civil Practice Act is guaranteed to him by section 22 of the Civil Service Law.

On the return of the petition and before the service of the answer respondents moved under section 1293 of the Civil Practice Act to dismiss the petition as a matter of law.

Respondents urge three grounds for dismissal, namely, first, that the Security Risk Laws is constitutional; second, that the determination of the authority may not be reviewed or corrected in this article 78 proceeding; and third, that the authority had reasonable grounds for belief that petitioner was of doubtful trust and reliability and that the authority properly considered and had the right to consider evidence brought to its attention by the Commissioner of Investigation of the City of New York.

The preamble of the Security Risk Law clearly recites that it is the intent of the Legislature that a person who is a member of a subversive organization is of doubtful

trust and reliability and that his employment in public service in a security position or in a position in a security agency would endanger the security and defense of the nation and of the state. The law defines the terms "security agency" and "security position" (sec. 1102) and provides for the determination whether an agency is a "security agency" and a position is a "security position" by the State Civil Service Commission (sec. 1103). The State Civil Service Commission has determined that the New York City Transit Authority is a "security agency." Section 1106 gives any person who believes himself aggrieved by a transfer or dismissal the right to exclusive appeal to the State Civil Service Commission.

The first question for determination here is whether the Security Risk Law, particularly section 1105 of the Unconsolidated Laws, is constitutional. Of course, a statute is presumed to be constitutional and the court may not declare it unconstitutional unless it is clearly so. If there is any doubt the expressed will of the Legislature should be upheld (*Munn v. Illinois*, 94 U. S., 113, 123, see also *Matter of Fay*, 291 N. Y., 198, 207).

30. It is also settled law that public employment is not a right but a privilege. The Legislature is free to impose reasonable restrictions upon the activities of employees as conditions of and part of the terms of their employment. Petitioner, as a civil servant, had no vested right in, or contract right to, his position and the Legislature therefore could say at any time upon what terms and conditions his employment may be continued or discontinued (*Cantelino v. McClellan*, 282 N. Y., 166). In the latter case the court said (at p. 170): "The People, in their new Constitution, could have abolished any or every public office in the State or changed the tenure of any office. Public officers are the servants of the People and the latter may say upon what terms they shall be engaged or continue in office after their engagement. Nothing limits the power of the People in this respect save a written constitution" (see also *United Public Works v. Mitchell*, 330 U. S., 75; *People ex rel. Miller v. Peck*, 73 App. Div., 89). In the present case the Legislature has found, as stated in the preamble of the Security Risk Law (sec. 1101) that the employment of members of subversive organizations

by government presents a grave peril to the national security; that these organizations are frequently well organized and rigidly disciplined and are dedicated to the overthrow of existing legally constituted government by any available means including force, if necessary. Significantly, the Court of Appeals in *Daniman v. Board of Education of City of N. Y.* (306 N. Y., 532) stated that the communist party was "a continuing conspiracy against our Government."

31 It does not seem unreasonable then for the Legislature to guard against such dangers by attaching conditions to employment in the public service and by adopting a procedure by which persons holding positions in security agencies could be dismissed where there is reason to believe that they might be members of subversive organizations. Indeed our courts have consistently upheld the right of the government to inquire into and to take measures to insure the loyalty of its employees (*Adler v. Board of Education of the City of N. Y.*, 342 U. S., 485, aff'g 301 N. Y., 476; *Garner v. Board of Public Works*, 341 U. S., 716; *Gerende v. Board of Supervisors*, 341 U. S., 56; *Bailey v. Richardson*, 182 F., 2d, 46, aff'd by an equally divided court 341 U. S., 918).

In my view the government has a duty to affirmatively exclude from public service its employees pledged to its overthrow by violence or subversion. Natural and moral law would surely dictate this modest measure for self-protection. No ordinary employer would be compelled to keep in his employ a person imbued with expressed determination to ruin him. The government should certainly not be in a lesser position. Nor should the public whom it represents be compelled to pay a salary to a public servant who plots to destroy its own way of life or be in a position to paralyze, disrupt or create panic at time of enemy action.

There is also an assertion by petitioner that the Security Risk Law is unconstitutional in that it denies procedural due process and operates upon unconstitutionally

32 vague standards. Under the statute a public employee is entitled to a written statement of the charges made against him, and in the present case petitioner did receive such a written statement. The statute also provides a reasonable time for the employee to an-

swer the charges, i. e., thirty days, and here the petitioner was given the required time to answer. Concededly, petitioner did not file an answer nor did he submit any statements or affidavits to explain his position. The determination made by respondents dismissing petitioner after his failure to answer the charges was an administrative act on their part and not judicial in character. Accordingly, in the absence of any statutory provision to the contrary, petitioner had no inherent right to a trial or a judicial hearing (*People ex rel. Keech v. Thomson*, 94 N. Y., 451; *People ex rel. Kennedy v. Brady*, 166 N. Y., 44).

The Security Risk Law also provides for an appeal to the State Civil Service Commission by any person who feels himself aggrieved by a determination of transfer or dismissal, but petitioner did not avail himself of this relief. It is to be observed that upon appeal the state civil service commission is given wide latitude to require amplification of the reasons given for the action appealed from, to hold or conduct public hearings or private hearings, and to subpoena and compel the attendance of witnesses and the production of books, papers, records and documents. Upon such hearing the employee is given the right by the statute to be represented by counsel and to present evidence in his behalf.

From the foregoing it is evident that the Security Risk Law is definite and clear and that under
33 its provisions a public employee is afforded all the safeguards of due process.

In *Bailey v. Richardson* (supra) the court upheld the right of the federal government to dismiss the employee without a trial on the ground of the superior's belief in the disloyalty of the employee to the government. There the superior's belief was predicated upon interrogatories creating the suspicion of membership in the Communist party and other allegedly subversive organizations. The court held that it was no valid objection that the employee was not told the names of the informants against her or that she was not permitted to face or examine them.

Petitioner's contention that the authority had no legal right to consider the evidence brought to its attention by the Commissioner of Investigation of the City of New York is also without force. The commissioner had the power

not only on behalf of the City of New York but also on behalf of the New York City Transit Authority to initiate an investigation as to petitioner's alleged affiliation with a subversive organization, title to the rapid transit facilities, i.e., the tunnels, elevated lines, yards, power plants and related properties is vested in the City of New York, and the transit authority operates these facilities under a lease executed by the city pursuant to Public Authorities Law, article 7, Title 15, section 1800, &c. The city, as the owner of these properties, has a proprietary interest in preserving them from sabotage or destruction and, consequently, in conducting an investigation to determine whether persons regularly employed in the operation of the transit system are members of subversive organizations or are of doubtful trust or reliability, the commissioner of investigation is making an investigation which, under the language of the New York City Charter, is "in the best interests of the City" (New York City Charter, sec. 803r[2]).

Furthermore, the transit authority is given the right by statute to avail itself of the services of the officers and agencies of the city government. Thus section 1803, subdivision 3-b, of the Public Authorities Law, provides in part as follows: "The authority shall be entitled to utilize the officers, employees, agents, facilities and services of the city on the same terms and conditions as were applicable to or provided to the board of transportation on March-fifteenth, nineteen hundred and fifty-three."

In view of the city's ownership of the transit system the commissioner of investigation properly initiated the investigation here involved and the authority had the right to make use of his services under the Security Risk Law, section 1105 of the Unconsolidated Laws. Moreover, the transit authority has the right under the statute to consider and weigh evidence from any source, whether it be from the commissioner of investigation or any other bureau or department of government. There is no limitation in the statute that the authority must make its determination upon evidence developed as a result of its own investigation. Significantly, the Court of Appeals in *Daniman v. Board of Education of City of New York* (supra) sustained the dismissal of several teachers in the

35 public schools and colleges of the City of New York upon the ground that they had refused to answer before a federal legislative committee whether they were at present or had been members of the Communist Party.

Petitioner also argues that reasonable grounds do not exist for the belief that his employment would endanger national or state security or defense. He contends that the assertion of his constitutional privilege cannot be regarded as "reasonable grounds" for belief that he was of doubtful trust and reliability. I am of the opinion that the determination of that question rests solely with the authority since the statute vests absolute discretion in the security agency to decide that issue. In any event, in reaching its determination the authority had to be guided by the declared public policy of the state, as set forth in its constitution, statutes and judicial records (*People v. Hawkins*, 157 N. Y., 1, 12; *Glaser v. Glaser*, 276 N. Y., 296, 301; *Matter of Carey v. Cruise*, 246 N. Y., 237, 243; *Mertz v. Mertz*, 271 N. Y., 466, 472). "Public policy is necessarily variable. It changes with changing conditions. It is evidenced by the expression of the will of the legislature contained in statutory enactments" (*Straus & Co. v. Canadian Pacific R. Co.*, 254 N. Y., 407, 413).

The public policy of this state, as stated in section 903 of the New York City Charter, is to make ineligible for public service any employee who fails or refuses to testify on grounds of possible self-incrimination. What is more important, such public policy is the fundamental law of the state, as expressed in article 1, section 6, of the New York State Constitution. In *Daniman v. Board* 36 of Education of City of New York (*supra*), the court, in sustaining the removal of the teachers for asserting their constitutional privilege, stated (at pp. 540-541): "In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See, *Communications Assn. v. Douds*, 339 U. S., 382, 425 et seq.; *Dennis v. United States*, 341 U. S., 494, 564; Preamble to the *Feinberg Law*; L. 1949, ch. 360, sec. 1). We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes

to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, sec. 1; Education Law, sec. 3002; Civil Service Law, secs. 12a, 30; L. 1951, ch. 233, secs. 1, 8.) Communism is opposed to such loyalty (*Communications Ass'n v. Douds*, 339 U. S., 382, 425 et seq., supra; *Dennis v. United States*, 341 U. S., 494, 564, supra)."

Thus the defined public policy in the law of this state is to the effect that the pleading of a constitutional privilege or the refusal to waive the constitutional privilege is ground for the removal of an employee from the public service. It seems to me that a public servant whose trust and reliability is in question must make a choice. He must choose between the refuge of the Fifth Amendment and a disclosure as to possible communist affiliation. If he insists upon the refuge which is apparently denied to even a non-public servant under the National Subversive

37 Activities Control Act of 1950, as it has thus far been construed, he should not complain if he be turned out of a position of public trust. If he makes the disclosure of non-affiliation he loses nothing and regains the confidence which was formerly beset by suspicions. Thus, guilty or not, no man in public service is entitled to withhold information as to his communist association and at the same time serve the people. I therefore do not think it can be said that the action of the transit authority in dismissing petitioner was arbitrary or unreasonable.

Moreover, the courts of our state will not interfere with the exercise of discretion on the part of the officer having the power of removal where the procedure outlined in the statute for removal has been followed and the charges upon which the removal is based are not frivolous or without substance (*Matter of McGuire*, 157 App. Div., 351, aff'd 209 N. Y., 597). It is petitioner's added contention that respondents have failed to comply with the provisions of section 22, subdivision 2 of the Civil Service Law. This, too, appears to have little merit. Petitioner was removed under the provisions of the Security Risk Law, which is a special statute enacted subsequent to section 22 of the Civil Service Law for the particular purpose of detailing the procedure to be used in considering cases involving disqualification from public employment for al-

leged subversive conduct. The Security Risk Law is comprehensive in form and the procedure outlined therein indicates a clear intent on the part of the Legislature to establish an exclusive and uniform method of dealing with loyalty cases. Since the Security Risk Law is a special statute which legislates for a particular field, its provisions are to be given effect and must be deemed to have modified the general statute, i. e., section 22 of the Civil Service Law, which applies to the removal of public employees for misconduct (*Hughes Tool Co. v. Fielding*, 188 Misc., 947, aff'd 172 App. Div., 1048, aff'd 297 N. Y., 1024). It will be noted that the Security Risk Law does not provide for judicial review, and, on the contrary, sets forth the intention of the Legislature that no such right was to be accorded an employee who is transferred or dismissed because of doubtful trust or reliability.

However, except for the provisions in section 22 of the Civil Service Law which permit of a judicial review, the procedure to be followed for removal under both the Civil Service Law and the Security Risk Law is similar. A comparison of section 22 of the Civil Service Law and section 1105 of the Unconsolidated Laws will disclose that similarity. And, in the present case, the procedure outlined in both statutes was substantially complied with by respondents in considering petitioner's case.

There remains for consideration the question whether petitioner has a right to review the transit authority's determination in an article 78 proceeding. Section 1106 specifically provides that any person conceiving himself aggrieved by the action of the removing agency may appeal to the State Civil Service Commission within twenty days after receiving notice of the determination of transfer or dismissal, and the State Civil Service Commission is authorized and required to decide the appeal.

Section 1285, subdivision 4 of the Civil Practice Act provides that, except as otherwise provided by statute, the procedure under article 78 shall not be available to review a determination where it can be adequately reviewed by an appeal to a court or some other body or officer. Were it not for the fact that the constitutionality of the Security Risk Law is here for the first time put at issue, the respondents' determination could have

been completely and adequately reviewed by an appeal to the State Civil Service Commission. Indeed, section 1106 expressly provides that "the decision of the Commission shall be final and conclusive and not subject to review by any court." So, to be consistent, the fact of validity of the statute would ordinarily require the petitioner to complete his statutory remedy by appealing to that body (People ex rel. Walrath v. O'Brien, 112 App. Div., 97). But the grounds for review do include the heretofore undetermined question of constitutionality of the statute whose sanctions are applied against the petitioner. In the absence of decisional law as to its constitutionality, he is justified in addressing himself to the court despite its provisions for final and conclusive determination by the State Civil Service Commission.

The Security Risk Law is in all respects valid and constitutional and the respondents' determination based thereon is affirmed as neither arbitrary nor unreasonable. The motion to dismiss the petition is granted.

40 IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 15187—1954

(Title Omitted)

Notice of Appeal to Appellate Division—Feb. 8, 1955

Sirs:

PLEASE TAKE NOTICE, that the petitioner above named, hereby appeals to the Appellate Division of the Supreme Court in and for the Second Judicial Department, from an order made in the above entitled proceeding by the Honorable Benjamin Brenner, Justice of the Supreme Court, on January 28th, 1955, and entered in the office of the Clerk of the County of Kings on January 29th,

41 1955, denying the petitioner's application pursuant to Article 78 of the Civil Practice Act, and for further relief, and granting the respondents' motion to dis-

miss the petition, and dismissing the petition and the above entitled proceeding, and from each and every part of said order.

Dated: New York, N. Y., February 8th, 1955.

Yours, etc.,

LEONARD B. BOUDIN,
Attorney for Petitioner,
Office and P. O. Address,
25 Broad Street,
Borough of Manhattan,
City of New York (5).

To:

CLERK OF THE COUNTY OF KINGS.

HAROLD L. WARNER, Esq.,
Attorney for Respondents,
370 Jay Street,
Borough of Brooklyn,
City of New York.

42 IN SUPREME COURT OF THE STATE OF
NEW YORK

COUNTY OF KINGS

(Title omitted)

Notice of Appeal to Court of Appeals—Aug. 16. 1956

Sirs:

PLEASE TAKE NOTICE that the petitioner, Max Lerner, hereby appeals to the Court of Appeals of the State of New York, from an order in the above-entitled proceedings, entered in the office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, on the 25th day of June 1956, filed in the Office of the Clerk of the County of Kings on the 27th day of June 1956, and served upon 43 the undersigned as attorney for the petitioner, Max Lerner, on the 9th day of August 1956. The said order, from which petitioner appeals, affirmed an order

of the Supreme Court, Kings County, entered in the above proceedings, denying petitioner's application for an order, pursuant to Article 78 of the Civil Practice Act, and dismissing the petition of the said petitioner. One Justice of the Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, dissented and voted to reverse the order of the Supreme Court, Kings County.

PLEASE TAKE FURTHER NOTICE that the petitioner, Max Lerner, appeals from each and every part of the aforesaid order of the Appellate Division of the Supreme Court, Second Department, and from the whole thereof.

Dated: New York, N. Y., August 16, 1956.

Yours, etc.

LEONARD B. BOUDIN
Attorney for Petitioner
Office and P. O. Address
25 Broad Street
New York 4, N. Y.

To:

CLERK OF THE COUNTY OF KINGS
Hall of Records
Brooklyn 1, N. Y.

44 DANIEL T. SCANNELL, Esq.
Attorney for Respondents
New York City Transit Authority
370 Jay Street
Brooklyn 1, N. Y.

JACOB K. JAVITS, Esq.
Attorney General of the State
of New York
Capitol,
Albany 1, N. Y.

45 AT THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK

Present:

HON. GERALD NOLAN,
Presiding Justice.

" GEORGE J. BELDOCK,

" CHARLES E. MURPHY,

" HENRY L. UGHETTA,

" PHILIP M. KLEINFELD,
Justices.

(Title omitted)

Order of Affirmance—June 25, 1956

The above named Max Lerner, the petitioner in this proceeding, having appealed to the Appellate Division
46 of the Supreme Court from an order of the Supreme Court entered in the office of the Clerk of the County of Kings on the 29th day of January, 1955, denying petitioner's application, pursuant to Article 78 of the Civil Practice Act, to be reinstated and restored to his position as Conductor by the New York City Transit Authority, etc., and granting respondents' motion to dismiss the petition, and dismissing the petition herein, and the said appeal having been argued by Mr. Leonard B. Boundin of Counsel for the appellant, argued by Mr. Daniel T. Scannell of Counsel for the respondents and submitted by Mr. James O. Moore, Jr., Solicitor General, and Ruth Kessler Toch, Assistant Attorney General, pursuant to Section 71 of the Executive Law deliberation having been had thereon, and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered that the order so appealed from be and the same hereby is affirmed, with \$50. costs and disbursements.

Nolan, P. J., Murphy, Ughetta and Kleinfeld, JJ., concur; Beldock, J., dissents and votes to reverse the order and to reinstate appellant in opinion.

Enter:

JOHN J. CALLAHAN,
Clerk.

47 IN SUPREME COURT OF THE STATE
OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL
DEPARTMENT

NOLAN, *P. J.*, BELDOCK, MURPHY, UGHETTA,
and KLEINFELD, *JJ.*

Opinion of Appellate Division

Appeal from an order of the Supreme Court at Special Term (Brenner, J.), entered January 29, 1955 in Kings County, granting respondents' cross motion to dismiss the petition.

LEONARD B. BORDIN, for appellant.

DANIEL T. SCANNELL and EDWARD L. COX, JR., for respondents.

48 JACOB K. JAVITS, Attorney-General (JAMES O. MOORE, Jr., and RUTH KESSLER TOCH of counsel), pursuant to section 71 of the Executive Law.

UGHETTA, *J.*:

With the outbreak of hostilities in Korea in 1950, the world's attention was rudely focused on the increasing audacity of the communist conspiracy, by force or by guile, to accomplish its long-announced aim of taking over the free world. The Legislature, early in its next session, accordingly enacted chapter 233 of the Laws of 1951, effective March 24, 1951, hereinafter referred to as the "Security Risk Law."

Section 1 is a declaration of legislative findings and intent.* It refers to the Korean situation, and then finds that the employment by government of members of well-organized and rigidly disciplined subversive groups presents a grave peril to the national security. It is then found that "If members of such organizations and groups and persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the exist-

ence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States." Having found the existence
 49 of this danger as a fact, the section then points to the remedy—"it is vital and essential that measures be taken to effect the disqualification for entrance into and the suspension and removal from security offices and positions in governmental service of persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in security positions would endanger the security or defense of the nation and the state."

Section 5 provides for the transfer to non-security positions or agencies of employees deemed to be security risks. This section specifically refers to a "security position" or "position in a security agency". A finding that the position itself is a sensitive one is not required. It is sufficient that it be in an agency that the State Civil Service Commission has determined to be one wherein functions are performed which are necessary to the security or defense of the nation and the State or where confidential information relating to such security or defense may be available, and such determination by the commission is subject to review by the courts (§§ 2, 3). Section 5 further provides for the suspension of employees when it is found "after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state." The suspended employee is to be given notice of such action and of the reasons therefor and is to be afforded an opportunity, within thirty days
 after such notice, to submit statements or affidavits.

50 Thereafter, following such further investigation and review as is deemed necessary, his transfer shall be affirmed or his employment terminated, if it shall be found that upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability his employment would endanger the security or defense of the nation and the State. Otherwise he is to be restored to his position and is entitled to back pay for the

period of his suspension. Section 6 provides for an appeal from the determination to the State Civil Service Commission and for a hearing by that body or by persons designated by it, and further provides that the decisions of the commission shall not be reviewable by the courts.

Section 7 provides that evidence shall not be restricted by the rules prevailing in the courts, that a finding may be based on previous conduct including, but not limited to, treasonable or seditious conduct or membership in any organization or group found by the State Civil Service Commission to be subversive. Section 8 defines a subversive group or organization to be one which is found by the State Civil Service Commission, after inquiry, to advocate, advise, teach or embrace the doctrine of overthrow of the government by force and violence. The commission, in making such inquiry, may utilize any listings or designations promulgated by, among others, any Federal agency, and may adopt designations of the United States Attorney General, provided such designation was made after due notice to such organization or group and an opportunity afforded it to answer.

51 Appellant has been removed pursuant to this statute from his position as a conductor on the New York city subway system on a finding that reasonable grounds exist for belief that because of his doubtful trust and reliability, his employment endangers the security or defense of the nation and State. He brings this proceeding pursuant to article 78 of the Civil Practice Act to secure his reinstatement.

The petition having been dismissed on the ground that it does not state facts sufficient to entitle appellant to the relief prayed for, we must take the allegations therein contained to be true. These allegations may be summarized as follows: Appellant is a citizen of the United States and a resident of the Borough of the Bronx. Respondents are members of the New York City Transit Authority, a public benefit corporation organized pursuant to section 1800 et seq. of the Public Authorities Law. It is an agency created by the State performing a governmental function (Public Authorities Law, § 1802) and as such governmental agency is subject to the provisions of the Security Risk Law. Under the provisions of section 1810 of the Public

Authorities Law appellant became an employee of the Transit authority subject to the provisions of the State Civil Service Law. His primary duties consisted of opening and closing subway doors to permit the entrance and exit of passengers together with certain routine duties incidental thereto. His service has at all times been deemed satisfactory and on one occasion he was awarded a commendation. On September 14, 1954 pursuant to instruction from his immediate supervisor, he appeared at the office of the commissioner of investigation of the city of New York where he was advised by a deputy commissioner that unless he answer all questions fully he would be subject to dismissal. After being sworn, he declined to answer questions concerning his political affiliations, relying upon his constitutional privilege. On two subsequent dates he appeared with counsel and was advised that the mayor of the city of New York had authorized the commissioner of investigation to inquire into the employment of certain persons in, among other agencies, the Transit Authority. He was again sworn and reiterated his refusal to answer for the reasons stated. On October 21, 1954 he was suspended. The resolution passed by the Transit Authority recited that it had been found, after due investigation and inquiry, that reasonable grounds exist for belief that, because of his doubtful trust and reliability, the employment of Max Lerner in the position of Conductor would endanger the security or defense of the nation and the state. It further provided that appellant might within thirty days submit statements or affidavits to show why he should be reinstated or restored to duty. He was informed that the action was taken because he refused to answer questions under oath as to whether he was then a member of the Communist party. His right to submit statements or affidavits within thirty days was pointed out to him. The petition alleges that no charge other than his refusal to answer was made and that for this reason no statements or affidavits were submitted. On November 24, 1954 appellant was discharged by resolution containing a recital similar to the one in the suspension resolution, together with a recital that he had not within the thirty-day period communicated with the Transit Authority.

The first question presented is whether the Security Risk Law is to be construed as authorizing the Transit Authority to suspend and discharge appellant merely upon a showing that invoked his constitutional privilege when asked if he was then a member of the Communist party. Section 5 of said law, unlike some other statutes, makes no specific reference to a refusal to answer.

It cannot be gainsaid that the communist conspiracy is a cancer threatening our nation's existence. As was pointed out in *Matter of Danimau v. Board of Educ. of City of N. Y.* (306 N. Y. 532, 540-541, overruled on other grounds in *Slochow v. Board of Higher Educ.*, 350 U. S. 551, rehearing denied U.S., May 28, 1956):

"In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See, *Communications Assn. v. Douds*, 339 U. S. 382, 425 et seq.; *Dennis v. United States*, 341 U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, Sec. 1.) We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, § 1;

Education Law, § 3002; Civil Service Law, §§ 12a, 54, 30; L. 1951, ch. 233, §§ 1, 8.) Communism is opposed to such loyalty. (*Communications Assn. v. Douds*, 339 U. S. 382, 425 et seq., *supra*; *Dennis v. United States*, 341 U. S. 494, 564, *supra*.) Internal security affects local as well as National Governments."

It is quite true we may not infer that appellant is a member of the Communist party from his assertion of privilege against self incrimination. On the other hand we are required to, and should, accept as truthful his statement that answers to the questions propounded might have tended to incriminate him. (*Ullmann v. United States*, 350 U. S. 422; see *Blau v. United States*, 340 U. S. 159.)

In *Garner v. Los Angeles Bd.* (341 U. S. 716), the court had before it a provision of the Los Angeles City Charter which provided that no person shall hold or retain public office or employment who advocated the overthrow of the

government or was a member of any organization advocating such overthrow. The city by ordinance required the execution of an affidavit by its officers and employees to the effect that they did not advocate the overthrow of the government or belong to any subversive organization. Some employees declined to execute such an affidavit and were discharged for this reason. The court upheld such action, stating (p. 720):

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may
55 have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

The above language was quoted with approval in *Adler v. Board of Educ.* (342 U.S. 485, 492-493), where the court upheld the constitutionality of the Feinberg Law (Education Law, § 3022).

Justice Frankfurter said in his concurring opinion in the *Garner* case (pp. 725-726):

"A municipality like Los Angeles ought to be allowed adequate scope in seeking to elicit information about its employees and from them. It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. In the context of our time, such membership is sufficiently relevant to effective and dependable government, and to the confidence of the electorate in its government. I think the precise Madison would have been surprised even to hear it suggested that the requirement of this affidavit was an 'Attainder' under Art. I, § 10, of the Constitution. . . . I cannot so regard it."

We apprehend that if a statute, such as the Los Angeles ordinance permitting discharge of a public employee for refusal to execute an affidavit of the character there required, is valid and justifies his discharge for that reason,

56 it is proper for a security agency, charged with the duty of determining whether an employee is of doubtful trust and reliability from a security standpoint to inquire into those matters and, if the employee refuses to answer, it may not be said that the agency is not empowered to find that such refusal, in and of itself, furnishes reasonable grounds for a belief that he is not a good security risk. It is our view that the correct construction has been placed on the Security Risk Law by the Transit Authority and by the Special Term.

We pass to the problem of constitutionality. Appellant takes exception to the statement of the Special Term that this "statute is presumed to be constitutional and the courts may not declare it unconstitutional unless it is clearly so." It is argued that there is a distinction between cases under the fourteenth Amendment involving property rights and those cases under that amendment which are tinged with personal rights protected in the First Amendment against an encroachment by the Federal government. The First Amendment reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

In *Board of Educ. v. Barnette* (319 U. S. 624, 639), the court said:

57 "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedom of speech and

of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

See, to the same effect, *Thomas v. Collins* (323 U. S. 516, 529-530).

Dennis v. United States (341 U.S. 494), involving the constitutionality of the Smith Act (U. S. Code, tit. 18, § 11), was clearly a freedom of speech case involving an enactment of Congress. Its validity was upheld. *Gitlow v. New York* (268 U. S. 652) involved a New York statute, similar to the Smith Act, making it a crime to advocate "the necessity or propriety of overthrowing * * *

58 organized government by force". It was held that the test was whether the statute was reasonable, and that it was entirely reasonable for the State to attempt to protect itself from violent overthrow, and the statute was perforce reasonable. *Communications Assn. v. Douds* (339 U.S. 382) was decided on the theory that a restriction on freedom of speech in the Federal statute (U. S. Code, tit. 29, § 159, subd. [h]) must pass the "clear and present danger" test. At page 412 it is stated that the First Amendment "requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial evil will result therefrom." *Schneider v. State* (308 U. S. 147) likewise involved a direct restriction on freedom of speech—an ordinance prohibiting distribution of literature and house to house canvassing unless licensed by the police.

On the whole we think the correct interpretation of these cases is that where the rights protected by the First Amendment are involved, closer scrutiny should be accorded to the evil which the Legislature seeks to remedy and a higher degree of care should be invoked before the courts sustain the validity of legislation impinging on these rights, than in a case where property rights, protected alone by the Fourteenth Amendment, are involved. But this is not to say that there is no presumption of constitutionality in a case of the statute duly enacted by a sovereign State.

In *Munn v. Illinois* (94 U. S. 113, 123) it was stated: "Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the express will of the legislature should be sustained" (see, also, *Matter of Fay*, 291 N. Y. 198, 206-207). In short, the stringency of the test to be applied in determining whether the presumption is overcome is in reality the difference between cases involving property rights and those where civil rights are concerned.

Our first inquiry must be whether the subject of the legislation before us is one on which the Legislature is permitted to act. We think the *Garner* and *Adler* cases hereinabove cited, sustaining the validity of the Los Angeles ordinance and of the Feinberg Law, leave no doubt on that score.

We proceed now to examine the question of whether the Security Risk Law bears a real and substantial relation to the permitted objective without unreasonably interfering with personal rights. Appellant's principal reliance is on *Anti-Fascist Committee v. McGrath* (341 U. S. 123) and *Wieman v. Updegraff* (344 U. S. 183). In the *Wieman* case on Oklahoma statute, requiring State officers and employees to take a loyalty oath stating, among other things, that they had not been for the preceding five years a member of any organization listed by the United States Attorney General as "a Communist front" or "subversive", had been construed by the State court as excluding persons from employment solely on the basis of membership in such organization irrespective of their knowledge of the activities and aims of the groups to which they had belonged. The court

held that as so construed the statute was violative of the due process clause of the Fourteenth Amendment, which does not permit a State to classify innocent with knowing association. The court stated (p. 191): "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." The court at pages 188-189 distinguished the *Garner* and *Adler* cases hereinabove referred to, on the ground that in the former *scienter* was implicit in each clause of the oath, and in the latter, as the court pointed out; "we expressly noted that the New York Courts had construed the

statute to require knowledge of organizational purpose before the regulation could apply."

The *Anti-Fascist Committee* case involved a situation where the United States Attorney General had listed certain organizations as communist *without notice or hearing*. These organizations sued for declaratory judgments and for injunctive relief. The lower courts granted motions to dismiss the complaints for failure to state claims upon which relief could be granted. The judgments were reversed and the cases remanded for instructions to deny the motions. Section 8 of the Security Risk Law specifically provides that the designation of an organization as subversive must have been made after notice, and appropriate hearing.

Recent authoritative word on the subject is *Slochower v. Board of Higher Education* (350 U. S. 551, *supra*). The New York Court of Appeals had held section 903 of the New York City Charter to be constitutional and applicable to refusal to answer questions concerning communist affiliations. (*Matter of Daniman v. Board of Educ. of City of N. Y.*, 306 N. Y. 532, *supra*) In the *Slochower* case the court held that statute to be invalid, at least in part, as violative of the due process clause of the Fourteenth Amendment. All the court actually decided was that a city college teacher, who was entitled to tenure and who could be discharged only for cause after notice, hearing and appeal under the provisions of subdivisions 2 and 10 of section 6206 of the Education Law, could be mandatorily and summarily dismissed for invoking the Fifth Amendment before a congressional committee conducting an inquiry *not* directed at the property, affairs of government of the city or the official conduct of city employees. The statutory provisions, as well as the facts, are clearly distinguishable. Section 903 of the charter apparently renders obligatory the discharge, without notice or hearing of any kind, of an employee who "shall, after lawful notice or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry or having appeared shall refuse to testify or answer any question regarding the property, government or affairs of the city or of any county included

within its territorial limits" and for like summary removal for refusal to waive immunity upon any such hearing or inquiry. The opinion of the court concludes with this language:

"... we consider the application of § 903. As interpreted and applied by the state courts it operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are
62 taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman v. Updegraff, supra*.

"It is one thing for the city authorities themselves to inquire into Slochower's fitness but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or . . . official conduct of city employees.' In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information.

"This is not to say that Slochower had a constitutional
63 right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest in

the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law." We apprehend that in view of the manner in which the court stressed the "remoteness of the period to which they [the questions] are directed," the failure of the statute to provide an opportunity to explain the reason for refusal to answer and, more particularly, the nature of the inquiry being conducted by the Federal committee, that decision must be strictly limited to its own peculiar facts. The reference to the *Garner* case is some indication that, had Professor Slochower's refusal to answer occurred before a duly constituted body investigating the affairs of the Board of Higher Education or of Brooklyn College, a different result would have been reached even under section 903 of the charter.

In the instant case, appellant's testimony was sought in a duly authorized inquiry by the commissioner of investigation into the affairs of the Transit Authority. He declined on three separate occasions to answer questions concerning his *present* membership in the Communist party. He was thereupon suspended, given notice and afforded, in accordance with the statute, an opportunity to explain his conduct. He proffered no explanation, nor did he avail himself of his right to an appeal and to full hearing before the State Civil Service Commission.

64 It is true that in the *Slochower* case the court stated: "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment." (350 U.S. 551, 557, *supra*.) But the court cited *Ullmann v. United States* (350 U.S. 422, *supra*), which upheld the validity of the Immunity Act of 1954 (U. S. Code, tit. 18, §34-6). The determination in the *Slochower* case fortifies the conclusion that we are required to, and should, accept as truthful appellant's claim that truthful answers to the questions propounded might have tended to incriminate him. The court, in the *Ullmann* case, cited and reaffirmed *Brown v. Walker* (161 U. S. 591), stating (p. 439): "Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases."

We see little similarity between the *Wieman, Anti-Facist Committee*, and *Slochower* cases and the one before us. We

are not here concerned with an arbitrary exclusion of an employee irrespective of his guilty knowledge or intent, remoteness of time or mistake or inadvertence, but with a finding, after an opportunity to submit a statement or affidavits and an opportunity to appeal to the State Civil Service Commission, that reasonable grounds exist for belief that because of doubtful trust or reliability he constitutes a security risk. Nor do we regard the determination in *Cole v. Young* (.... U. S., decided June 11, 1956) as indicating a different conclusion. The Statute there construed is the so-called Federal Security Risk Law of 1950 (U. S. Code, tit. 5, § 22-1). The court pointed out (p.):

65 "The Act was expressly made applicable only to the Departments of State, Commerce, Justice, Defense, Army, Navy, and Air Force, the Coast Guard, the Atomic Energy Commission, the National Security Resources Board, and the National Advisory Committee for Aeronautics. Section 3 of the Act provides, however, that the Act may be extended 'to such other departments and agencies of the Government as the President may, from time to time, deem necessary in the best interest of national security.' And the President has extended the Act under this authority 'to all other departments and agencies of Government.'" The court held (....): "(1) that the term 'national security' is used in the Act in a definite and limited sense and relates only to those activities which are directly concerned with the Nation's safety, as distinguished from the general welfare; and (2) that no determination has been made that petitioner's position was affected with the 'national security' as that term is 'used in the Act', and that the dismissal there was accordingly not authorized by the Act. It was further stated (p.): "In reaching this conclusion, we are not confronted with the problem of reviewing the Secretary's exercise of discretion, since the basis for our decision is simply that the standard prescribed by the Executive Order and applied by the Secretary is not in conformity with the Act." In reaching this conclusion as to the congressional intent, the court reasoned as follows (pp.):

"Virtually conclusive of this narrow meaning of 'national security' is the fact that had Congress intended the

term in a sense broad enough to include all activities of the Government, it would have granted the power to terminate employment 'in the interest of the national security' to all agencies of the Government. Instead, Congress specified 11 named agencies to which the Act should apply, the character of which reveals, without doubt, a purpose to single out those agencies which are directly concerned with the national defense and which have custody over information the compromise of which might endanger the country's security, the so-called 'sensitive' agencies. Thus, of the 11 named agencies 8 are concerned with military operations or weapons development, and the other 3, with international relations, internal security, and stock-piling of strategic materials. Nor is this conclusion vitiated by the grant of authority to the President, in § 3 of the Act, to extend the Act to such other agencies as he 'may, from time to time, deem necessary in the best interests of national security.' Rather, the character of the named agencies indicates the character of the determination required to be made to effect such an extension. Aware of the difficulties of attempting an exclusive enumeration and of the undesirability of a rigid classification in the face of changing circumstances, Congress simply enumerated those agencies which it determined to be affected with the 'national security' and authorized the President, by making a similar determination, to add any other agencies which were, or became, 'sensitive.' That it was contemplated that this power would be exercised 'from time to time' confirms the purpose to allow for changing circumstances and to require a selective judgment necessarily implying that the standard to be applied is a less than all-inclusive one.

All this is clearly distinguishable from the situation in the case at bar, where, as has been pointed out, the statute specifically requires the State Civil Service Commission to make a determination, reviewable by the courts, that the agency or position is in fact one which affects the security of the State or nation.

Irrespective of the propriety of regarding the mere invoking of the privilege against self incrimination (which might be considered by some a technicality, although others would regard it of considerable substance) as constituting

a justification for a finding of doubtful trust and reliability, we feel that the Transit Authority's conclusion was indeed warranted when appellant declined to state, on whatever grounds, whether he was a member of a conspiracy dedicated to the forcible overthrow of our government, refused to explain such declination, and failed to take advantage of an opportunity to be heard on the subject.

While the State may not arbitrarily and capriciously bar a person from public employment, nonetheless a person does not have an unqualified right to work for the State on his own terms; the State may impose reasonable terms. As the court said in *Adler v. Board of Educ.* (342 U. S. 485, 492, *supra*): "If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not."

With respect to the contention that procedural due process was denied appellant because he was not accorded the rights provided in section 22 of the Civil Service Law governing the procedure to be followed in the removal of civil service employees for misconduct or incompetency; it is necessary only to point out that the last sentence of subdivision 3 of said section provides:

"Nothing herein contained shall be construed to repeal or modify any general, special, local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any city or any civil division."

(See *Matter of Ryan v. Hand*, 258 App. Div. 912; *Matter of Skinkle*, 249 N. Y. 172; *Matter of Gran v. Speers*, 206 Misc. 1020.) Section 22 must be held to be inapplicable here. Had appellant availed himself of his right to appeal to the Civil Service Commission, it may well be that rather than being discharged he would have been transferred to a non-security position or agency.

The order should be affirmed, with \$50 costs and disbursements.

NOLAN, P.J., MURPHY and KLEINFELD, J.J., concur.

BELDCOCK, J. (dissenting).

On October 21, 1954 appellant was suspended, and on November 24, 1954 discharged, by the New York City Transit Authority from his position as a subway conductor. His duties consisted primarily of opening and closing subway doors to permit the entrance and exit of passengers. The ground for the action of the Transit Authority was that appellant held a position in a security agency, and that reasonable grounds existed for belief that, by reason of doubtful trust and reliability, his continued employment would endanger the security or defense of the United States and of New York State. The latter finding was based *solely* on evidence that appellant had invoked the constitutional privilege against self incrimination when questioned by the New York city department of investigation concerning his past or present membership in the Communist party. The action was taken pursuant to the purported authority of the Security Risk Law.

In my opinion, appellant's suspension and discharge were illegal for three reasons: (1) the Security Risk Law is inapplicable to employees of the New York City Transit Authority because its employees are not in the service of the State or of any civil division thereof; (2) even if the Security Risk Law is applicable to employees of the Transit Authority, it is inapplicable to appellant because he did not hold a security position therein or a sensitive position affected with the security or defense of the nation or the State, and (3) neither suspension nor discharge is authorized under the Security Risk Law where the assertion of the constitutional privilege against self incrimination is the only evidence of doubtful trust and reliability endangering the security or defense of the nation and the State.

The New York City Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation." (Public Authorities Law, § 1801, subd. 1.) It was established as a separate entity because of the administrative and fiscal advantages attained by the separation of its functions from the general administrative machinery of the State and its civil divisions (1929 Atty. Gen. 223) and to insulate the State from liability in the performance of a specific pub-

lie service. Despite the fact that the Transit Authority is a corporate agent and instrumentality of the State in the discharge of a governmental function (1949 Atty. Gen. 138: Public Authorities Law, § 1802, subd. 2), its employees are *not* employees of the State or of any of its civil divisions. (1951 Atty. Gen. 152.) The Security Risk Law applies by its terms only to persons in "governmental service" (§§ 1, 4), i.e., in the service of the State or of any of its civil divisions (§§ 3, 5). Since appellant, as an employee of the Transit Authority, was not in the service of the State or of any civil division thereof, he was not encompassed by the Security Risk Law. Therefore, his suspension and subsequent discharge pursuant to that law were illegal.

However, even assuming that the Security Risk Law was applicable to employees of the Transit Authority, it was *not* applicable to appellant because there is no finding that he held either a security position or a sensitive position affected with the security or defense of the nation or State. The basic language of the State law under consideration was adopted from language used with respect to Federal agencies. (See Governor's memorandum approving the law, McKinney's 1951 Session Laws of N. Y., p. 1587.) The Supreme Court has recently held (*Cole v. Young*, . . . U. S. . . ., decided June 11, 1956) that the Federal Security Risk Law (U. S. Code, tit. 5, § 22-1) does not apply to all positions in security agencies, but only to security positions therein. The court limited the use of the term "national security," as used in that law, to comprehend only those activities of the government directly concerned with the protection of the nation from internal subversion or foreign aggression, and found that activities which contribute to the strength of the nation only through their impact on the general welfare were not included therein. The court specifically held that the summary procedure for suspension and discharge authorized therein is available only with respect to an employee in a sensitive position or to one situated where he can bring about a discernible effect on the nation's security, i.e., to employees whose position is affected with, and whose misconduct would adversely affect, the national security. The State law presently under consideration, patterned on the similar Federal law, should be given the

same interpretation. In the case at bar, although there is a finding that appellant's employment in the position of conductor endangers the security or defense of the nation and State, similar to the general finding in *Cole v. Young*, (*supra*), there is absent the finding which the Supreme Court held a necessary requisite to suspension or discharge under the Federal law, to wit, that appellant's position as conductor was one in the category to which the Security Risk Law is limited. The opinion indicated that the latter finding might be based on evidence that the position was sensitive because the employee had access to governmental secrets or classified material, or that he was in a position to influence policy against the interests of the government. Without that necessary finding here, the suspension and discharge were invalid.

72 Finally, there was no proof that appellant was a security risk within the provisions of the statute. The essence of the majority opinion is that, accepting as truthful appellant's statement that answers to questions as to his past or present membership in the Communist party might have tended to incriminate him, such refusal to answer, standing alone, gives reasonable ground to believe that appellant is of doubtful trust and reliability and thereby his continued employment as a subway conductor endangers the security or defense of the United States and New York State. It is precisely that inference of guilt from the truthful assertion of the same privilege in answer to the same questions which was repudiated by the Supreme Court in *Stachower v. Board of Higher Educ.* (350 U. S. 551, 557) when it said: "We must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. . . . The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

The Security Risk Law does not provide that a refusal to answer questions concerning membership in the Communist party, or the assertion of a constitutional privilege, when asked such questions, is sufficient ground for suspension or discharge. On the contrary, section 7 thereof seems to require affirmative evidence of wrongful conduct

on the part of the employee to support a finding under either section 4 or section 5. Section 7 provides that a finding under section 4 or section 5 may be based on membership in a subversive organization. Unless the statute is construed to mean guilty rather than innocent membership, it would be invalid. (*Wicman v. Updegraff*, 344 U. S. 183; *Garner v. Los Angeles Bd.*, 341 U. S. 716.) Yet, although the constitutional privilege serves to protect persons innocent of any wrongdoing whatever (*Schlochower v. Board of Higher Educ.*, 350 U. S. 551, *supra*), and although no inference of membership in the Communist party may be drawn from the assertion of the privilege (*Matter of Daniman v. Board of Educ. of City of N. Y.*, 306 N. Y. 532, 538), the majority holds that appellant was properly suspended and discharged, whether or not he was a member of the Communist party, and whether he was an innocent or guilty member thereof. The mere exercise of the constitutional privilege has now become the basis for suspension and discharge under the statute, quite apart from an inference of guilt. In my opinion, such a determination not only departs from established authority, but permits the court to set as a criterion that which the Legislature has not done, namely, to make the assertion of the privilege a test of endangering the security or defense of the nation and the State. In the *Schlochower* case it was held that a State violates due process when it makes a claim of privilege ground for discharge. Yet here, where the statute does not provide what the statute there expressly provided, the Transit Authority has nevertheless made the claim of privilege ground for suspension and discharge, and the majority has approved that action. I am unable to concur in such a determination.

The order should be reversed and the appellant should be reinstated.

74 IN THE COURT OF APPEALS OF NEW YORK

**Order Granting Leave to New York Civil Liberties Union to
File Amicus Curiae Brief—November 28, 1956**

A motion having heretofore been made herein by the New York Civil Liberties Union for leave to file a brief amicus curiae and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted.

75 IN THE COURT OF APPEALS OF NEW YORK

In the matter of MAX LERNER, Appellant, against HUGH J. CASEY et al., Constituting the New York City Transit Authority, Respondents.

Opinion—Decided February 28, 1957

CONWAY, Ch. J. We are here concerned with the question of whether petitioner is entitled to an order reinstating him to the position of subway conductor in the New York City Transit System. He has been discharged from such position by the respondents, constituting the New York City Transit Authority, upon the ground that a reasonable basis exists for the belief that, because of his doubtful trust and reliability, his employment in the position of conductor endangers the security or defense of the nation and the State.

On September 14, 1954, pursuant to instructions received from his immediate superior, petitioner appeared at the office of the commissioner of investigation of the City of New York for the purpose of answering questions in an investigation being conducted by the commissioner. After he was sworn, petitioner was asked whether he was then a member of the Communist party. He refused to answer upon the ground that to do so might tend to incriminate him and that, therefore, he was entitled to claim the privilege against self incrimination afforded him under the Fifth Amendment to the United States Constitution.

After being advised of the provisions of the Security Risk Law (L. 1951, ch. 233, as amd.) and being given an opportunity to reconsider his refusal, he reappeared at the office of the Department of Investigation on September 21, 1954, at which time he requested additional time to engage counsel. On September 30, 1954 he
 76 appeared, accompanied by counsel who requested and was granted a further adjournment. On October 8, 1954 petitioner again appeared with counsel and once more refused to answer question as to whether he was then or had been a member of the Communist party.

The foregoing facts were brought to the attention of the Transit Authority. Thereafter, on October 21, 1954, the Authority adopted a resolution suspending petitioner, without pay, effective at the close of business on October 22, 1954. The resolution was sent to the petitioner with a covering letter. Both the letter and the resolution recited the reasons for the action taken and both notified the petitioner that he had the opportunity, within 30 days after notification, to submit statements or affidavits to demonstrate why he should be reinstated or restored to duty.

By report dated November 22, 1954, the executive director and general manager notified the Authority that, during the 30-day period allowed him, neither petitioner, nor anyone on his behalf, had communicated with the Authority or the Department of Investigation of the City of New York, and that further investigation had revealed activities on the part of the petitioner which gave reasonable grounds for belief that he was not a good security risk. The Authority then found, upon review, that, upon all the evidence, reasonable grounds existed for the belief that because of his doubtful trust and reliability, the employment of petitioner in the position of conductor endangered the security or defense of the nation and the State. Accordingly, the employment of petitioner was terminated at the close of business on November 24, 1954.

The Security Risk Law, under which petitioner was discharged, was adopted in 1951 and has been extended so that its terminal date is now June 30, 1957 (L. 1956, ch. 310), unless extended again.

It will be helpful if we here summarize the various sections of the Security Risk Law.

The first section—section 1—is the declaration of the Legislature's findings and intent. It states, in part, that the Legislature “* * * finds that the employment of members of subversive groups and organizations by government presents a grave peril to the national security. These groups and organizations are frequently well organized and rigidly disciplined, and often under the direction and control of a foreign power are dedicated to the task of bringing about the overthrow of existing legally constituted government by any available means, including force if necessary. If members of such organizations * * * concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the existence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States. * * *”

Section 5 provides for the suspension and removal or transfer of an employee under the statute. The provision conferring this authority is as follows: “Any public officer, board, body of commission of the state or of any civil division thereof authorized by law, rule or regulation to exercise the power of appointment may, in his or its absolute discretion and when deemed necessary in the interests of national security, transfer, subject to the approval of the civil service commission having jurisdiction, to a position other than a security position or to an agency other than a security agency; or suspend without pay any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in

such position would endanger the security or defense of the nation and the state."

*Section 4 contains the provisions as to disqualification of applicants or eligibles.

The balance of the suspension and dismissal section (§ 5) contains the provisions for notification to the employee of the action taken and of the steps he may then take. They are as follows: "The officer or employee with respect to whom such action was taken shall be notified that such action was taken pursuant to this section and, to the extent possible without disclosing confidential sources of information of law enforcement agencies, or agencies empowered or required by law to investigate subversive activities or disloyalty, the reasons for such action. Within thirty days after such notification, such person shall have an opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty. Following such further investigation and review as he or it shall deem necessary, the officer, board, body or commission taking such action shall affirm the transfer or terminate the employment of such officer or employee if he or it shall find, that, upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability, the employment of such person in a security position or in a security agency would endanger the security or defense of the nation and the state. If the officer, board, body or commission finds no reason to warrant the transfer or removal of such officer or employee, he shall be restored to his position and if such officer or employee has been suspended
78 from his position, he shall, upon restoration, be entitled to back pay for the period of his suspension."

Section 6 provides for appeal to the State Civil Service Commission by any person who believes himself aggrieved by a determination under sections 4 or 5, and the proceedings to be had upon such appeal.

Section 7 deals with evidence which may be considered in proceedings under the act. It declares that finding of disqualification (under § 4) and a determination of suspension, removal or transfer from the position (under § 5)

may be based upon evidence of previous conduct, which may include "to the extent deemed appropriate," but shall not be limited to evidence of "four forms of conduct. One of these is "membership in any organization or group found by the state civil service commission to be subversive."

Section 8 provides that a subversive group or organization, as used in the law, shall be one found by the State Civil Service Commission, after inquiry and appropriate notice and hearing, to advocate the overthrow of the government by force and violence, or so designated by the United States Attorney General or by the State Board of Regents pursuant to the Feinberg Law (Education Law, § 3022), provided these designations were made upon notice to the organization or group and opportunity afforded to answer.

Section 2 defines "security agency" as meaning: " * * * any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available."

The section defines "security position" as: " * * * (1) any office or position in the public service which requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available."

Section 3 provides how it shall be determined what is a security agency or security position: "Upon its own initiative or whenever requested by the head of any department, bureau, division or other agency of the state government, or by any municipal civil service commission, or board, or body, authorized by law to conduct examinations and certify eligibles for positions in the service of the state or its civil divisions, the state civil service commission shall determine whether or not (1) an agency is a security agency within the meaning of section two (a) of this act, or (2) a position is a security

79 position within the meaning of section two (b) of this act. Such determination by the state civil service commission shall be subject to review by the courts in accordance with the provisions of article seventy-eight of the civil practice act."

On November 23, 1953 the State Civil Service Commission declared the New York City Transit Authority to be a security agency within the meaning of the Security Risk Law. On March 24, 1954 by resolution the commission listed the Communist party of the United States and of the State of New York as subversive within the meaning of the Security Risk Law. This was based upon and was an adoption of such listing of the Communist party by the State Board of Regents under the Feinberg Law.

The facts as to petitioner's discharge under the Security Risk Law have been set forth above.

On this appeal the following basic questions are presented:

(1) Whether the New York City Transit Authority is a "board, body or commission of the state or of any civil division thereof" within the intendment of the Security Risk Law and whether the city commission of investigation had jurisdiction to conduct the inquiry;

(2) Assuming that the answer to (1) be in the affirmative, whether the Transit Authority was properly designated a "security agency";

(3) Assuming that the answer to (2) be also in the affirmative, whether the Security Risk Law authorizes the Transit Authority to suspend and discharge one occupying the position of subway conductor in such security agency merely upon a showing that, when asked if he was *then* a member of the Communist party, he refused to answer, and then gave as a reason for so refusing, that to answer might tend to incriminate him within the meaning of the Constitution, and

(4) Assuming that the answer to (3) be also in the affirmative, whether the Security Risk Law is constitutional.

We shall treat of the questions seriatim.

The New York City Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation". (Public Authorities Law, § 1801, subd. 1.) It operates the transit facilities owned by the City of New York. It is comprised of three members, one of whom is appointed by the Mayor of the City of New York, one by the Governor of the State and the third member (who shall be chairman of the board) appointed by the first two members after their appointment and qualification. Neither the chairman nor any member shall hold any other paid public office or employment under the Government of the United States, of the State of New York or of the City of New York. The Authority performs the vital function previously vested in the Board of Transportation of the City of New York, which was a city agency and eligible to be declared a security agency.

80 It is clear that the danger to government to be anticipated from the activities of a subversive individual in the employ of the Transit Authority is no different from the danger to government to be anticipated from such individual if he were still in the employ of its predecessor body, the Board of Transportation. We think it also clear that the purpose of the Legislature in enacting the Security Risk Law was to protect the government and those public authorities performing vital functions of government from the peril of infiltration of subversive individuals into the public service. Accordingly, in our judgment, the Transit Authority is a "board, body or commission of the state or of any civil division thereof" within the intendment of the Security Risk Law.

The petitioner argues that the city's interest in the transit system is that of lessor of the physical properties only, and that such interest does not justify its interrogation of employees of the Transit Authority. We do not agree.

The City of New York is empowered, through the commissioner of investigation, to investigate and inquire into all matters of concern to the city or its inhabitants (see General City Law, § 20, subd. 21; § 23, subd. 1; New York City Charter, § 803). As we have said, the City of New

York owns the rapid transit facilities which constitute the New York City Transit System. In June of 1953 those facilities were leased by the city to the Transit Authority for a period of 10 years. Under the lease the city is required to pay the costs of the capital improvements on the transit system and, so, the city has a proprietary interest in preserving and protecting those facilities from sabotage or destruction. Moreover, it cannot be doubted that the very existence of the city is dependent upon the safe and uninterrupted operation of the transit system. Certainly, an investigation to determine whether employees of the transit system are members of subversive organizations or are of doubtful trust and reliability is "in the best interests of the city" (New York City Charter, § 803, subd. 2). That being so, the investigation here involved was properly initiated by the commissioner of investigation (see *Matter of Cherkis v. Impellitteri*, 307 N. Y. 132, 148).

The Public Authorities Law confers upon the Transit Authority the right to avail itself of the services of the officers and agencies of the city government (see Public Authorities Law, § 1803, subd. 3, par. b). The Authority must be said to have exercised its right to make use of the services of the commissioner of investigation and, in effect, to have authorized said commissioner to conduct the investigation on its behalf, when it directed the petitioner to appear before the commissioner to answer questions designed to ascertain whether he was of doubtful trust and reliability. Under the Security Risk Law the Authority is not required to make its determination upon evidence developed as a result of its own investigation—it has the right to consider and weigh evidence from any source.

We turn now to the question of whether the Transit Authority was properly designated a "security agency."

The law defines the term "security agency" as follows: "(a) The term 'security agency' as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential informa-

tion relating to the security or defense of the nation and the state may be available."

The Transit Authority performs a function necessary to the security or defense of the nation and the state. This fact was vividly demonstrated recently when certain New York City subway motormen went out on strike. Mr. Justice LUBIANO, Special Term, New York County, in issuing an injunction against those motormen, aptly pointed out (*New York City Tr. Auth. v. Loos*, 2 Misc 2d 733, 738): "It is easy to forget, while the subways are running, that there is room for motor vehicles on the streets only because millions travel by subway; for if all persons had to use surface transportation, the bridges and tunnels and main highways would soon be hopelessly clogged. New York with its immense territory and its five separate boroughs, all protected by unified police and fire departments and having many other integrated services, is dependent for its very life and daily functioning, and for the immediate safety of its 8,000,000 inhabitants, on rapid transit facilities which are necessarily used by nearly all persons engaged in all of its governmental and other vital functions. Whatever may be the case elsewhere, and under other conditions, whatever may have been the case in other times, here and now, and for this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare. It is worth re-emphasizing that the subways are the city's arteries upon which its life and daily living depend. . . ."

We consider it clear, therefore, that the Transit Authority has been properly denominated a "security agency".

The Appellate Division, in concluding that the petitioner's refusal to answer the question posed constituted sufficient justification for his dismissal under the Security Risk Law, wrote:

"We apprehend that if a statute, such as the 82 Los Angeles ordinance* permitting discharge of a

* In *Garner v. Los Angeles Bd.* (341 U. S. 716), the Supreme Court of the United States upheld an ordinance of the City of Los Angeles which required

public employee for refusal to execute an affidavit of the character there required, is valid and justifies his discharge for that reason, it is proper for a security agency, charged with the duty of determining whether an employee is of doubtful trust and reliability from a security standpoint, to inquire into those matters and, if the employee refuses to answer, it may not be said that the agency is not empowered to find that such refusal, in and of itself, furnishes reasonable grounds for a belief that he is not a good security risk. It is our view that the correct construction has been placed on the Security Risk Law by the Transit Authority and by the Special Term."

Petitioner contends that the Legislature in enacting the Security Risk Law intended that a security risk agency must have a hearing at which it introduces evidence against the employee before it may find the employee to be a security risk and that it may not discharge the employee for mere failure to answer the question as to Communist party membership. The respondents, on the other hand, contend that the refusal to reply to the crucial question as to Communist party membership is "evidence" of "doubtful trust and reliability", which is the ground for discharge under the Security Risk Law. They point out that the petitioner was not discharged on the ground that he was a Communist party member. He was discharged

every employee to execute an affidavit, stating whether or not he was or ever had been a member of the Communist party or the Communist Political Association. Mr. Justice CLARK, writing for the court, said (p. 720):

"The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid." This reasoning, it seems to us, is determinative of the case presently before us.

for having created a doubt by declining to answer whether he was or was not a member.

We agree with the respondents.

It seems to us that it would be more clear if we suppositionally divided the conduct of petitioner into two parts. The first, when he was asked by his employer whether he was then a member of the Communist party. That 83 question he refused to answer. He then left the room. Certainly by that conduct he would have given evidence of his own untrustworthiness and unreliability. Suppose then, as the second part of his conduct, he returned five minutes later and told the commissioner of investigation that he had refused to answer his question because to do so might tend to incriminate him. May not the employer discharge an employee who refuses to answer his proper question? If the petitioner, in the case supposed, had not returned to the commissioner five minutes later and given a reason for his conduct, we think all would agree that he was properly discharged. Does it change the situation because he returns to say that he refused to answer because to do so might tend to incriminate him? Does that explanation destroy the evidence which he has given to his employer of his untrustworthiness and unreliability as a security risk? Does the explanation *require* that the employer consider without any doubt that the employee by his explanation has again become trustworthy and reliable as a security risk as a matter of law? We think not.

The intent of the Security Risk Law was to set up a removal procedure which would provide a more ready means of removing security risks from public service than sections 22 or 12-a of the Civil Service Law. This is apparent from the fact that even under the Civil Service Law an employee, refusing to answer questions put to him by his employer pertaining to his official conduct, may be removed, after a hearing, under a charge of insubordination without any showing by the employer of the information which prompted the inquiry.

The contentions of the petitioner (1) that the Security Risk Law is unconstitutional because an emergency no longer existed in 1954 when the petitioner was dismissed since the Korean War had ended and (2) no emergency

could conceivably justify the dismissal of the petitioner because his position as a conductor could have no rational connection with national security, are untenable.

As to (1) all that need be said is that the wisdom of the Legislature in extending the Security Risk Law beyond the period of the Korean War has been confirmed by world events transpiring since the Korean Truce.

As to (2) we are in accord with respondents that the importance of the petitioner's position to the security of the State and of the City of New York can be readily seen when it is considered that in modern warfare the civilian population may well be a prime target. A bombing raid on New York City would undoubtedly be planned for a time when the maximum number of people would be in the city. The most important facility for the evacuation of the people would be the subway system. If the petitioner were a member of the Communist conspiracy

84 he would, as an employee of the transit system in charge of a train, as conductors are, be a very real threat to the security of the State and of the city.

It may be argued that one conductor can do very little harm. The answer to that argument, however, is to be found in the words of Mr. Justice JACKSON in his concurring opinion in *Dennis v. United States* (341 U. S. 494, 564): "The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in *transportation*, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion." (Emphasis supplied.)

The final question pertains to the constitutionality of the Security Risk Law, as thus construed and applied to petitioner.

The petitioner contends that the case of *Slochower v. Board of Educ.* (350 U. S. 551) is controlling authority for the proposition that the Security Risk Law, as so construed, is unconstitutional.

In distinguishing the *Slochower* case, the majority of the Appellate Division concluded that the holding there was merely that a teacher in a city college, entitled to tenure, and who could be discharged only for cause and after notice, hearing, and appeal, could not be mandatorily and summarily dismissed *solely* on the ground that he invoked the protection of the Fifth Amendment before a Congressional committee conducting an inquiry not directed at the property, affairs, or government of the city or the official conduct of city employees. In further distinguishing the *Slochower* case, the Appellate Division said, in part: " . . . We apprehend that in view of the manner in which the court stressed the 'remoteness of the period to which they [the questions] are directed,' the failure of the statute to provide an opportunity to explain the reason for refusal to answer and, more particularly, the nature of the inquiry being conducted by the Federal committee, that decision must be strictly limited to its own peculiar facts. The reference to the *Garner* case is some indication that, had Professor Slochower's refusal to answer occurred before a duly constituted body investigating the affairs of the board of higher education or of Brooklyn College, a different result would have been reached even under section 903 of the charter."

85 We believe that the Appellate Division has properly distinguished the *Slochower* case (*supra*) from the present case. In that case the majority of the Supreme Court said (350 U. S. 551, 558):

"As interpreted and applied by the state courts, it [New York City Charter, § 903] operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence

or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibitions of *Wieman v. Updegraff, supra*.

"It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or . . . official conduct of city employees.' In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

Here, the city was conducting an investigation to determine whether any employees of the Transit Authority were of doubtful trust and reliability; such investigation was properly instituted in the best interests of the city; the question asked was not remote, it was as to petitioner's *then* membership in the Communist party—a continuing conspiracy against our form of government; no inference of membership in that party was drawn from petitioner's refusal to reply to the question asked and, finally, the petitioner was given an opportunity to explain why he had chosen not to answer the question. Petitioner was not discharged for invoking the Fifth Amendment; he was discharged for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist party membership.

In the *Slochower* case it was the plea of the Fifth Amendment, and that alone, causing automatic dismissal which the Supreme Court condemned. The Security Risk Law does not so operate. When the employee refuses to tell his employer whether he is a mem-

ber of the Communist party, surely he is giving evidence of "reasonable grounds" for doubt as to whether, as Mr. Justice BRENNER said in the Special Term opinion, he "might be" a member; he is giving "reasonable grounds" for "doubt" about his trustworthiness and reliability as a security risk. If, in refusing, the employee injects his claim of privilege under the Fifth Amendment, that circumstance is incidental or additional. The dismissal is still proper for refusing that vital, fundamental information. Were that not so, this would be the result: An employee may be dismissed for refusing to give information as to whether or not he is a Communist party member (*Garner v. Los Angeles Bd.; supra*), but if with his refusal he draws into or adds to his words of refusal a claim that to answer might tend to incriminate him and he, therefore, claims the privilege to refuse to answer under the Fifth Amendment to the United States Constitution, he may not be dismissed. That cannot be.

The petitioner also argues that he asserted his constitutional privilege with respect to a Federal crime and as a part of his national citizenship so that his dismissal abridged his privileges and immunities as a citizen of the United States. It seems to me that such an argument is untenable in a situation such as this where the employee uses the privilege to thwart his employer in ascertaining whether or not he is a member of a criminal conspiracy. In the *Slochower* case (*supra*), as we have pointed out, the Supreme Court indicated that when the questions are asked by the city the employee has an obligation to answer.

The order of the Appellate Division should be affirmed, with costs.

FULD, J. (dissenting). While I am not unmindful of the public interest to be served by ridding government of the subversive and the security risk, I cannot join in the courts decision, for, in my view, the appellant's discharge from his job of subway conductor was effected in disregard of the applicable statute and in violation of constitutional right.

The Security Risk Law was enacted in 1951, as a temporary emergency measure (L. 1951, ch. 233), in response to the Communist aggression in Korea the year before

(§ 1). In substance, it authorizes "Any public officer, board, body or commission of the state or of any civil division thereof" to discharge or suspend "any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security 87 or defense of the nation and the state" (§ 5).¹ A

"security agency" is defined as any agency or unit of government where "functions are performed which are necessary to the security or defense of the nation and the state" or where "confidential information relating to the security or defense of the nation and the state may be available." A "security position" is a post in the public service "which requires the performance of functions which are necessary to the security or defense of the nation and the state" or one in any public agency or department "where confidential information relating to the security or defense of the nation and the state may be available" (§ 2). To the State Civil Service Commission is delegated the authority of determining whether an agency is a security agency or whether a job is a security position within the meaning of the statute (§ 3).

It is open to grave doubt that the New York City Transit Authority, set up as a "body corporate and politic constituting a public benefit corporation" (Public Authorities Law, § 1801, subd. 1), may be regarded as an agency "of the state or of any civil division thereof" within the ambit of the act before us (Security Risk Law, § 5). It

1. Another provision recites that the finding required by section 5 "may be based upon evidence of the previous conduct of the . . . officer, or employee . . . which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive" (§ 7; emphasis supplied).

is likewise dubious that the Transit Authority may correctly be labeled a "security agency" within the statute's definition (§ 2, subd. [a]). However, I put these troublesome doubts to one side, since I am thoroughly persuaded that, in any event, the Security Risk Law may not be stretched, under the circumstances of this case, to reach the appellant whose duties are to open and close the doors of subway trains.

Parlous though the times, the anticipation of risks to "the security or defense of the nation and the state" (§ 5) from a person in the appellant's position strikes me as a submission to unreasoning fear rather than a rational basis for administrative action. (Cf. *Cole v. Young*, 351 U. S. 536; *Matter of Pinggera v. Municipal Civil Service Comm.*, 206 Misc. 615.) The job of opening and closing the doors of a subway train is hardly one of the "strategic posts in transportation" to which Mr. Justice JACKSON adverted in *Dennis v. United States*, 341 U. S. 494, 564 (see opinion of CONWAY, Ch. J., *ante*, p. 970). Of course, all men possess a capacity to do injury, but, to pose a risk to 88 security or defense, one's potential for harm must be greater, more distinctive, than this appellant's; no less danger or risk is to be anticipated from any one of the millions of persons who periodically ride the subways as passengers.²

However, even if the statute were to be held to apply to the appellant, his dismissal cannot be sustained without violating his right to due process of law under both state

2. It should, of course, be noted that in appellant's case the statute's careful definition and examples of a "security position" have been entirely ignored. It is argued that they are irrelevant because the State Civil Service Commission has designated the Authority a "security agency," thereby converting its every post into a "security position," but I find no justification in the statute for such action. (Cf. *Cole v. Young*, *supra*, 351 U. S. 536.)

Indeed, the record tells us nothing of the steps taken by the commission in reaching its determination. Moreover, we are left completely in the dark as to whether the appellant or others affected were notified that the matter was under consideration, or even that the determination had been made. (Security Risk Law, §§ 2, 3; cf. *Anti-Fascist Comm. v. McGrath*, 341 U. S. 123, 165 *et seq.*, per FRANKFURTER, J., concurring) We are not even told where the determination of the commission is to be found or whether any opportunity was afforded for the prescribed judicial review (§§ 3, 4; cf. *Adler v. Board of Educ.*, 342 U. S. 485, 490).

and federal constitutions (N.Y. Const., art. 1, § 6; U. S. Const., 14th Amdt.).³

The statute, as noted, requires a finding based "upon . . . evidence" that, "because of doubtful trust and reliability, the employment of [the] person . . . [in question] would endanger the security or defense of the nation and the state" (§ 5). The only "evidence" in support of the Transit Authority's finding "of [appellant's] doubtful trust and reliability" consisted of his refusal, on the basis of the constitutional privilege against self incrimination, to answer questions put to him by the city commissioner of investigation relating to membership in the Communist party. Apart from his constitutionally protected silence, there was not the slightest evidence or predicate in the record for any inference that he was a member of that organization, that he was of doubtful trust or reliability or that his continued employment would prove dangerous to state or nation.

It is important at the outset to observe that we have here no question whether the state could with propriety, by a clearly worded statute, impose an absolute duty upon public officers or employees to answer questions relating to their official conduct as a condition of continued employment. (See New York City Charter, § 903; N. Y. Const., art. 1, § 6; cf. *Garner v. Los Angeles Bd.*, 341 U. S. 716.) The statute before us, essentially different, imposes no such condition. Instead, it authorizes dismissal only upon "evidence" that the particular officer or employee is of such "doubtful trust and reliability" as to endanger the "security" or "defense" of the nation and the state. The narrow issue here presented, therefore, is whether the appellant's exercise of his constitutional right to remain mute may serve as the basis for inferring the existence of the facts prescribed by the statute as a condition of discharge.

Slochower v. Board of Educ. (350 U.S. 551), though concerned with a different statute and a somewhat different situation, seems to me decisive that such an inference may

3. In the view thus taken, I have no occasion to consider the appellant's further reliance upon the privileges and immunities clause of the Fourteenth Amendment—though I am inclined to agree with the court's conclusion that that clause is not here applicable. (Cf. *Adamson v. California*, 332 U. S. 46; *Slochower v. Board of Educ.*, 350 U. S. 551, 555.)

not be drawn from the mere assertion of the privilege. The Supreme Court there held; and in unmistakable terms announced, that an imputation of guilt from the claim of privilege would constitute "arbitrary action" violative of the "very essence of due process" (p. 559).

Firmly established as "one of the great landmarks in man's struggle to make himself civilized" (Griswold, *The Fifth Amendment Today* [1955], p. 7), the privilege against self incrimination stands as a bulwark for the protection of persons accused, as well as of witnesses, who, though entirely innocent of any wrongdoing, may have a reasonable and honest fear of prosecution. Recognition of this fundamental right demands that it be freely exercisable without undue restraint or invidious consequences. As the Supreme Court declared in *Slochower* (350 U.S., at p. 557):

"At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown v. Walker*, 161 U. S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn v. United States*, 349 U. S. 155. In *Ullman v. United States*, 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

90 It is urged that the *Slochower* decision is not in point, since the Supreme Court itself there noted that the case involved the assertion of the privilege in an investigation conducted by a "federal committee" rather than by "city authorities" (p. 558). That observation, however, in no way operated to lessen the force either of the Supreme Court's sweeping condemnation of "the practice of imputing a sinister meaning to the exercise of a

person's constitutional right under the Fifth Amendment" or of the court's solemn affirmation that that right "would be reduced to a hollow mockery if its exercise" could be twisted into a confession of guilt or disloyalty.

Yet that is precisely the vice of what was done in this case. It is contended that a public officer or employee, unlike the general citizenry, may properly be found to be at least "of doubtful trust and reliability," if not actually disloyal, where he claims his right to refuse to answer questions relating to his possible association with a subversive organization. Whether, however, the refusal be taken as an admission of his membership in such organization or merely as engendering a doubt as to his reliability, the fact remains that in either instance an adverse, "sinister" inference, fraught with serious consequences, is attempted to be drawn from the invocation of the constitutional privilege. Based as it was solely upon his exercise of the privilege, the appellant's discharge constitutes "arbitrary action" within *Slochower*, regardless of the formal difference in the labels employed. Any other conclusion would be strange indeed: to treat reliance upon a fundamental constitutional guarantee as proof of "untrustworthiness and unreliability" is anomalous, a veritable contradiction in terms.

The point is made that the appellant should have availed himself of the opportunity afforded by the statute of submitting statements or affidavits "to show why he should be reinstated or restored to duty" (Security Risk Law, § 5). As I read the record before us, the "opportunity" was illusory, a Hobson's choice. His alternatives were either to repeat his reliance upon the constitution or to forego that right, to reassert his privilege or to capitulate and answer the question. His failure to make the choice is, consequently, irrelevant.

There is ever a need to achieve a balance between government security and the traditional rights of the individual. That balance has been destroyed by the way in which the statute before us has been applied. It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties. The fears and doubts of the moment may loom large, but lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees.

"Historic liberties and privileges," this court declared some twenty-five years ago (*Matter of Doyle*, 257 N. Y. 244, 268), "are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (HOLMES, J., in *Northern Securities Co. v. United States*, 193 U. S. 197-400), are not to change their form and content in response to the 'hydraulic pressure' (HOLMES, J., *supra*) exerted by great causes."

I would reverse the orders of the courts below.

VAN VOORHIS, J. (concurring in part with FULD, J.). In my view this was a "sensitive" employment, but petitioner was discharged upon the sole ground specified in the Security Risk Law, viz., that he was a bad security risk: in the legislative language, that his retention in this position "would endanger the security or defense of the nation and the state" (L. 1951, ch. 233, § 5, as extended). He was not charged with insubordination in refusing to answer questions relating to matters that might affect his qualifications for his work by reason of past or present affiliations. He was discharged upon an affirmative finding of fact that he was a bad security risk, of which there was no evidence except that he had invoked the Fifth Amendment. I concur in the part of Judge FULD's opinion in which he reasons that invoking the Fifth Amendment does not have probative force to establish that petitioner has engaged in subversive conduct or to establish that in his position of employment he "would endanger the security or defense of the nation and the state", and that using it as evidence thereof constitutes a denial of due process of law.

For these reasons, in my judgment, the order appealed from should be reversed.

DESMOND, DYE, FROESSEL and BURKE, JJ., concur with CONWAY, Ch.J.; FULD, J., dissents in an opinion in which VAN VOORHIS, J., concurs, in part, in a separate memorandum.

Order affirmed.

92 IN THE COURT OF APPEALS OF NEW YORK

93 No. 306

In the matter of the

Application of MAX LERNER, *Appellant*,
For an Order &c.,

vs.

HUGH J. CASEY, & ors., constituting the New York City
Transit Authority, *Respondents*.

Remittitur—February 28, 1957

BE IT REMEMBERED, That on the 18th day of October in the year of our Lord one thousand nine hundred and fifty-six, Max Lerner, the appellant in this cause, came here unto the Court of Appeals, by Leonard B. Boudin, his attorney, filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Hugh J. Casey, & ors., constituting the New York City Transit Authority, the respondents in said cause, afterwards appeared in said Court of Appeals by Daniel T. Scannell, their attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

94 WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Leonard B. Boudin, of counsel for the appellant, and by Mr. Daniel T. Scannell, of counsel for the respondents, and by Miss Ruth Kessler Toch, of counsel for the Attorney General of the State of New York, pursuant to Section 71 of the Executive Law, brief filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

95 THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Clerk of the Court of Appeals of the State of New York.
RAYMOND J. CANNON,

96 IN THE SUPREME COURT OF NEW YORK
COUNTY OF KINGS

Judgment on Remittitur—March 11, 1957

The above named petitioner having appealed to the Court of Appeals of the State of New York from an order entered in the Office of the Clerk of the Appellate Division, Second Department on the 25th day of June, 1956, and filed in the Office of the County of Kings on the 27th day of June, 1956, which affirmed an order of Supreme Court Justice Benjamin Brenner entered in the Office of the Clerk of the County of Kings on the 29th day of January, 1955, denying petitioner's application and granting respondents' motion to dismiss the petition and the

97 proceeding herein; and said appeal having been duly argued in said Court of Appeals and said Court of Appeals having ordered and adjudged that said order so appealed from as aforesaid be affirmed with costs, and having ordered that the proceedings therein be remitted to this Supreme Court there to be proceeded upon according to law;

Now on reading and filing the remittitur from the Court of Appeals herein and upon motion of Daniel T. Seannell, attorney for the respondents herein, it is hereby

ORDERED that the order and adjudication of said Court of Appeals affirming said order of the Appellate Division with costs, be and the same hereby is made the order and adjudication of this court.

ENTER

JOHN E. CONE, JR.
J.S.C.

Granted... March 11, 1957.

JOSEPH B. WHITTY,
Clerk.

98 IN SUPREME COURT OF THE STATE OF NEW
YORK, COUNTY OF KINGS

In the Matter of the Application of
MAX LERNER, *Appellant*, for an Order under Article 78 of
the Civil Practice Act,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
HENRY K. NORTON and DOUGLAS M. MOFFAT, constituting
the New York City Transit Authority, *Respondent*.

Notice of Appeal to the Supreme Court of the United States—
April 23, 1957

SIRS:

I.

NOTICE IS HEREBY GIVEN that Max Lerner, the above named appellant, hereby appeals to the Supreme Court of the United States from the final decree of the Court of Appeals of the State of New York affirming the dismissal of appellant's petition for an order directing the appellees to restore appellant to his position as subway conductor. The final decree of the Court of Appeals of the State of New York was entered in this proceeding on February 28, 1957.

This appeal is taken pursuant to 28 U.S.C., § 1257 (2).

II.

The Clerk of the Supreme Court of the State of New York, County of Kings, will please prepare a transcript

of the record in this cause and include in said transcript the following:

The Papers on Appeal in this proceeding to the Court of Appeals of the State of New York.

The remittitur from the Court of Appeals, dated February 28, 1957..

99 The opinions in the Court of Appeals.

The order of this Court, dated March 11, 1957, making the order of the Court of Appeals the order of the Court.

This Notice of Appeal.

III.

The following questions are presented by this appeal:

1. Whether the dismissal from public employment of a subway conductor with tenure contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States where such dismissal is upon the ground that he is a security risk, the sole evidence thereof being his invocation of his constitutional privilege against self-incrimination.

2. Whether the dismissal of the said employee for "Activities . . . which give reasonable ground for belief that he is not a good security risk," contravenes the due process clause of the Fourteenth Amendment, where he was never served with charges of such activities, there was no hearing, and he has never been informed of the nature of the "activities."

3. Whether the discharge of a subway conductor for membership in the Communist Party violates his right to freedom of speech, assembly and association under the Fourteenth Amendment to the Constitution of the United States when such membership is at most inferred from his invocation of the constitutional privilege and scienter is not charged.

4. Whether the appellant's privilege against self-incrimination under the Fifth Amendment to the United States Constitution and his immunities and privileges under the Fourteenth Amendment thereto were abridged by his dismissal from public employment because he had asserted

100 his constitutional privilege in a proceeding conducted by state authorities in pursuance of the federal government's security program.

5. Whether the state court's interpretation and application herein of the privilege against self-incrimination under the State Constitution, Article I, § 6, is not so restrictive and inconsistent with that court's liberal construction and application of the privilege in cases involving public officials, members of the bar and other persons as to deny the appellant the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

6. Whether the determination that appellant's work was "necessary to the security and defense of the nation and the state" was in violation of his right to due process under the Fourteenth Amendment when the making of such determination was without notice to appellant and without evidence or hearing, and, further, was arbitrary and unreasonable in view of the nature of his duties.

7. Whether the appellant has not been denied due process under the Fourteenth Amendment to the United States Constitution when he was discharged from employment as a subway conductor by the New York City Transit Authority upon the basis of findings, *inter alia*, that the Communist Party was a "subversive organization" and that the New York City Transit Authority was a "security agency" within the meaning of the Security Risk Law, N. Y. Laws 1951, c. 233 as amended, when he was not a party to any proceeding making such findings and was not afforded, under the said statute, any opportunity to challenge such findings.

Dated: New York, N. Y.

April 23, 1957.

Yours, etc.,

LEONARD B. BOUDIN

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TO:

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103 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 165

MAX LERNER, *Appellant,*

VS.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
ET AL.APPEAL from the Court of Appeals of the State of New
York.**Order Postponing Jurisdiction—October 14, 1957**

The statement of jurisdiction in this case having been submitted and considered by the Court; further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is assigned for argument immediately following No. 63. One hour and a half is allowed for argument in each case.

105 SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 165

MAX LERNER, *Appellant*,

VS.

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN,
ET AL.**Order Granting Motion for Leave to Proceed in Forma
Pauperis—December 9, 1957**

ON CONSIDERATION of the motion for leave to proceed
further herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and
the same is hereby granted.